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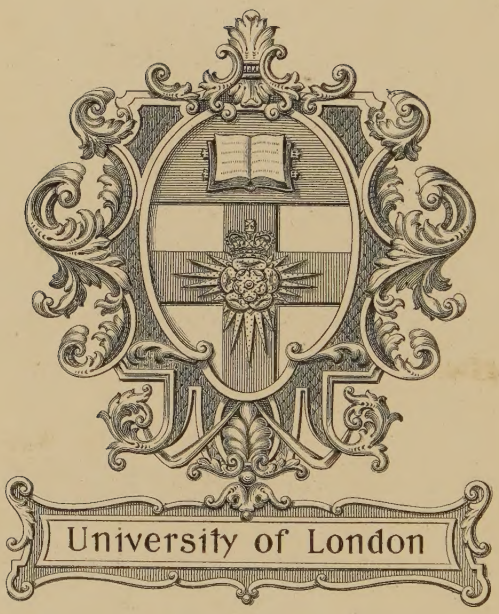

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LAW REPORTS

OF THE INCORPORATED COUNCIL OF LAW REPORTING.

Supreme Court of Judicature.

CASES DETERMINED IN THE

CHANCERY DIVISION

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1921.—VOL. II.

PUBLISHED BY THE COUNCIL AT ITS OFFICE, 30, MONTAGUE STREET, LONDON, W.C. 1,
AND
PRINTED BY W. SPEAIGHT & SONS, LTD., 98-99, FETTER LANE, LONDON, E.C. 4.

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The Mode of Citation of the Volumes of the *Law Reports* commencing January 1, 1921, will be as follows:—

In the First Series,
[1921] 1 Ch. [1921] 2 Ch.

In the Second Series,
[1921] 1 K. B. [1921] 2 K. B. [1921] 3 K. B. [1921] P.

In the Third Series,
[1921] 1 A. C. [1921] 2 A. C.

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CASES

DETERMINED BY THE

CHANCERY DIVISION

AND IN

LUNACY

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL.

In re PAUL.

PUBLIC TRUSTEE *v.* PEARCE.

[1919. P. 1682.]

SARGANT J.

1921

Feb. 9.

Will—Revocation by Marriage—Exception in Case of Appointment in exercise of Power—Vesting of appointed Interest at Age of 25—Perpetuity—Wills Act, 1837 (1 *Vict. c.* 26), *s.* 18.

A testator, who died in 1895, gave a share in his residuary estate to trustees in trust to pay the income thereof to his daughter, Mrs. A., during her life, and to hold the share after her death, but only if she should so direct by will or codicil, in trust for such child or children of hers and in such manner as she should by will or codicil appoint. He also by his will declared that, subject as aforesaid, he left all his residuary estate "not hereby or hereunder" effectually disposed of in trust for his two other daughters.

In 1917 Mrs. A. by her will appointed that the share bequeathed to her by her father's will should be held in trust for her son A. J. A. contingently on his attaining the age of 25 years. She was married for the second time in April, 1919, and died in July, 1919. A. J. A. was then 18 or 19 years old:—

Held, (1.) that the will, being made in exercise of a power of appointment when the property appointed would not in default of appointment

SARGANT J.

1921

PAUL, *In re.*

PUBLIC TRUSTEE *v.* PEARCE.

pass to any of the persons specified in the bracketed part of s. 18 of the Wills Act, 1837, was not revoked by the subsequent marriage; and (2.) following *Wilkinson* v. *Duncan* (1861) 30 Beav. 111 and *Von Brockdorff* v. *Malcolm* (1885) 30 Ch. D. 172, that the appointment to A. J. A. was valid, although the vesting was postponed until he was 25 years old.

Observations on *In re Wright* [1906] 2 Ch. 288.

SIR EDWARD JOHN DEAN PAUL, who died in 1895, by his will directed the trustees thereof, as regarded four-twelfths of the residue, "to hold the same in trust to pay the income thereof to my said daughter, Harriet Mary Georgina Pearce, during her life, without power of anticipation. And to hold the said share after her death, but only if she shall so direct by will or codicil, in trust for such child or children of hers, or such other descendants of mine, whether through her or any other child of mine, and in such shares or manner, and with such provision for maintenance, advancement or hotch-pot, as she shall by will or codicil appoint, but subject, if she by will or codicil so appoint, to any life interest or lesser interest of any husband of hers." The testator then directed, as to two other shares, that they should be held upon the like trusts in favour of two other daughters, and that the remaining share should be held "on like trusts and subject to like powers as the first mentioned share of four-twelfths, but with the substitution of the name of my said daughter Mabel Lisa Atherton for the name of my said daughter Harriet Mary Georgina Pearce." The will then proceeded as follows: "And I declare that, subject as aforesaid, I leave all my residuary estate that may not hereby or hereunder be effectually disposed of to the trustees hereof, upon trust to invest the same on the above stated securities for the benefit of my said daughters Harriet Mary Georgina Pearce and Gladys Lisa Paul in equal shares, during their lives, as joint tenants and not as tenants in common, and, after the death of the survivor of them, for the benefit of such of my own grandchildren as may be living at my death and may survive my last above mentioned two daughters, per capita absolutely."

The testator died in 1895, and Mrs. Atherton made her will, dated July 26, 1917, clause 4 of which was as follows:

"In exercise of the power for this purpose given to me by the will of my late father, Sir Edward Dean Paul, and of every or any other power me hereunto enabling, I appoint that two twelfth shares of my said father's residuary estate in which I now have a life interest, and any accretions which may be made thereto either during my life or after my death, shall be held in trust for my said son Aubrey James Atherton contingently on his attaining the age of twenty-five years."

At or about the date of her will Mrs. Atherton was divorced. On April 26, 1919, she remarried, and she died on July 9, 1919.

Two questions were raised by originating summons (as amended)—namely, (1.) whether her marriage, subsequent to the date of the will, revoked the will, and (2.) whether the appointment in favour of her son was void as a perpetuity, because the vesting was postponed until he attained 25.

Warwick Draper for the plaintiff stated the facts and the questions raised by the summons.

Galbraith K.C. and *P. F. S. Stokes* for the defendants Mrs. Pearce and D. A. Bevan (the other trustee). The marriage of Mrs. Atherton after making her will revoked the will: see s. 18 of the Wills Act, 1837. If the will was not so revoked, the appointment to the defendant Atherton was inoperative by reason of the vesting being postponed until he attained the age of 25 years: *In re Wright* (1); *In re Thompson.* (2)

[*A. Grant K.C.* and *R. W. Turnbull* for the defendant Atherton referred to *Wilkinson* v. *Duncan* (3); *Von Brockdorff* v. *Malcolm* (4); and Jarman on Wills, 6th ed., pp. 318, 330; *In re Hallinan's Trusts* (5) and Gray on Perpetuities, 3rd ed., pars. 523c and 523*d*, were also referred to.]

A. Grant K.C. and *R. W. Turnbull* for the defendant Atherton were not called on.

(1) [1906] 2 Ch. 288.
(2) [1906] 2 Ch. 199.
(3) 30 Beav. 111, 116.
(4) 30 Ch. D. 172.
(5) [1904] 1 I. R. 452, 460.

SARGANT J. 1921 — PAUL, *In re.* PUBLIC TRUSTEE *v.* PEARCE.

SARGANT J. The first question here is as to the validity of an exercise, by the will of the late Mrs. Atherton, in favour of her son, of a power of appointment given to her under the will of her father, Sir Edward John Dean Paul. By the will of her father the residuary estate was divided into fractional shares, the first share, consisting of four-twelfths, being settled on one daughter, Mrs. Harriet Mary Georgina Pearce, and the other shares being settled by reference to the settlement of that share. [His Lordship read the trusts relating to the share of Mrs. Pearce and continued:] Then the testator directed, as to two other shares, that they should be held upon the like trusts in favour of two other daughters, and that, with regard to the remaining share—the share now in question—it should be held "on like trusts and subject to like powers as the first mentioned share of four-twelfths, but with the substitution of the name of my said daughter Mabel Louisa Atherton for the name of my said daughter Harriet Mary Georgina Pearce." [His Lordship then read the ultimate trust of residue, and read clause 4 of Mrs. Atherton's will and continued:] Mrs. Atherton had at the date of her will been, or was shortly afterwards, divorced, but the material facts are that she remarried on April 26, 1919, and died on July 9, 1919.

With regard to the appointment in favour of her son, two questions arise, one of which is, whether her marriage subsequent to the date of her will had the effect of revoking the will. Of course, it would have that effect if the will had been an ordinary one and not a will limited to dealing with the exercise of the special power of appointment. The section of the Wills Act which I have to consider is s. 18, which is as follows: "Every will made by a man or woman shall be revoked by his or her marriage (except a will made in exercise of a power of appointment, when the real or personal estate thereby appointed would not in default of such appointment pass to his or her heir, customary heir, executor, or administrator, or the person entitled as his or her next of kin, under the Statute of Distributions)." Now here it appears to me that, on the true construction of the will of Sir J. D. Paul,

there was, first of all, a settlement on each daughter of the income of her share during her life, with remainder to her children or the other grandchildren of the testator as the lady should appoint, and that for the moment, as each share was so settled, the trusts in default of appointment were not declared, but that, immediately after the settlement of the four separate shares, there was a general clause—beginning with the words, "And I declare that, subject as aforesaid, I leave all my residuary estate that may not hereby or hereunder be effectually disposed of"—which swept in and disposed of anything not appointed in respect of any of those shares and was a perfectly clear gift in default of appointment applying to each one of the four separate fractions of the estate. That being so, the gift in default of appointment not being within the terms of the words in brackets in s. 18 of the Wills Act—that is to say, the property not in default of appointment passing to Mrs. Atherton's heir, customary heir, executor, administrator, or next of kin under the Statute of Distributions—it follows, in my judgment, that the will, so far as it exercised this limited or special power of appointment, was not revoked by the marriage; and in fact that has been recognized by the Probate Division, which has granted probate of the will as being an exercise of the limited power of appointment. In my judgment, therefore, the first point must be decided in favour of the defendant Aubrey James Atherton, who was an infant when the summons was taken out, but is now of the age of 21 years.

The other question is whether the appointment in favour of Mr. Atherton is void as a perpetuity, because the vesting is postponed until he attains the age of 25 years. There is ample and quite conclusive authority in favour of the appointment being good. *Wilkinson* v. *Duncan* (1) and *Von Brockdorff* v. *Malcolm* (2) are direct decisions in favour of the validity of the exercise of the power, and the whole of the reasoning in *In re Thompson* (3) is also in the same direction, although the facts of that case were not such as to raise the

(1) 30 Beav. 111. (2) 30 Ch. D. 172.
(3) [1906] 2 Ch. 199.

SARGANT J. 1921 PAUL, *In re.* PUBLIC TRUSTEE *v.* PEARCE.

exact point raised here, inasmuch as the persons to whom the appointment was made had in fact been born in the lifetime of the original testator. Further, in the text-books on the subject—Farwell on Powers, 3rd ed., p. 327; Gray on Perpetuities, 3rd ed., pars. 523*c* and 523*d*; and Jarman on Wills, 6th ed., p. 330—the point is treated as absolutely clear.

The only doubt which has been suggested is one arising from the statement of facts in the report of *In re Wright.* (1) But, as regards that case, two remarks apply. It was there assumed that an appointment of this kind was bad, as being an infringement of the rule against perpetuities. But, in the first place, it is clear that the attention of the learned judge was not directed to this point at all, that he was dealing with a completely different point, and that the whole of his judgment is directed to that other point. The second observation is that it is extremely probable that there were facts in that case which are not set out in the report, and which naturally would be omitted from the report, because they do not affect the question actually decided by the learned judge, that the appointment in question was void as a perpetuity for reasons or facts other than those which are stated in the judgment itself.

Having regard to the fact that the son in this case was 18 or 19 years old at the time of his mother's death, so that his interest must vest in him in six or seven years after her death, I decide that the gift to him is good, contingently, of course, on his attaining the age of 25 years.

I also decide that the accumulations of income must go with the capital.

Solicitors for the plaintiff and the defendants Mrs. Pearce and D. A. Bevan: *Hughes, Lightbody & Minton.*

Solicitors for the defendant Atherton: *Nicholson, Patterson & Freeland.*

(1) [1906] 2 Ch. 288.

F. E.

In re WINFREY AND CHATTERTON'S AGREEMENT.

SARGANT J.

1921

Feb. 11, 16.

[1920. W. 2455.]

Landlord and Tenant—Provision against Assignment without Licence—Licence not to be unreasonably withheld—Refusal because Lessor desires Possession.

A tenancy agreement of a house to the plaintiff contained a provision that the tenant was not to assign, underlet, or part with the possession of the house without the consent of the landlord, which consent was "not to be unreasonably withheld in the case of a respectable and responsible person." The defendant purchased the reversion, thus becoming the landlord, intending to occupy the house herself, and she alleged a bargain with the plaintiff for the purchase of the house, but the plaintiff denied that the matter had gone beyond negotiation The plaintiff assigned her interest to a respectable and responsible person, but the defendant refused to consent to the assignment:—

Held, that the refusal was unreasonable, and that the plaintiff was entitled to assign without licence.

Observations on the judgment of Kay L.J. in *Bates* v. *Donaldson* [1896] 2 Q. B. 241.

In February, 1920, Lady Winfrey granted a tenancy agreement of a house called "Flaxwell," in Hunstanton, to the plaintiff, Mrs. Chatterton, for a term of three years from April 6, 1919. The agreement provided that the tenant was not to assign, underlet, or part with the possession of the house without the consent of the lessor, which consent was "not to be unreasonably withheld in the case of a respectable and responsible person."

The defendant Mrs. Evison on August 16, 1920, purchased the freehold reversion in the house from Lady Winfrey, thus becoming the plaintiff's landlord. The purchase was not made as an investment, but because the defendant wished to have the house for her personal occupation. She accordingly offered to purchase the remainder of the term from the plaintiff, and alleged that there had been a verbal contract between them for the purchase of the house and some personal chattels. The plaintiff denied the existence of any contract, alleging that there had only been some negotiation. No attempt was made to enforce the alleged contract.

The plaintiff assigned the house to H. W. Hutson for the

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residue of the term, and her solicitor, who did not know of the sale of the reversion, applied to Lady Winfrey for her consent to the assignment of the tenancy. The application was forwarded to the defendant's solicitors, and she refused to give her consent, although, as the evidence showed, Hutson was a perfectly respectable and responsible person.

The plaintiff took out an originating summons asking for a declaration that she was entitled, in the events which had happened, and notwithstanding that the defendant had refused her consent, to assign the tenancy to Hutson.

Wilfrid Hunt (*J. E. Harman* with him) for the plaintiff. In *Bates* v. *Donaldson* (1) there was a similar provision as to assignment, and the lessor withheld the licence to assign because he desired to obtain possession of the premises, but the Court of Appeal held that the licence had been unreasonably withheld, and that the lessor was not entitled to recover possession, the assignee being a respectable and responsible person. That decision is directly in point.

F. K. Archer for the defendant. In *Bates* v. *Donaldson* (1) the lessor had not made any offer to purchase the leasehold term, and Kay L.J. intimated that if he had offered to buy at the price asked for by the lessee, the result might have been different.

Wilfrid Hunt in reply.

SARGANT J. [after stating the facts]. The case before me is very like that of *Bates* v. *Donaldson*. (1) There the landlord, whose lease contained a similar provision, refused to give a licence to assign, because he desired to obtain possession of the premises, and the Court of Appeal held that that was not a sufficient reason for the refusal. The only difference here is that the defendant asserts that there was a definite concluded contract for a sale by the plaintiff, although it was not enforceable as regards the land.

In *Bates* v. *Donaldson* (1) Kay L.J. in his judgment says: "As the proposed assignee in this case is a respectable and

(1) [1896] 2 Q. B. 241, 244, 247.

responsible person, the plaintiff"—the landlord—"must show a strong reason for withholding his consent. Clearly it is not sufficient for him to say, 'I want to oblige the lessee to sell to me.' He must at least be able to show that at the time when the consent was refused, if that was his motive, the refusal did no harm to the lessee."

That part of the statement of the law by Kay L.J. has been accepted as correct by both the learned counsel now before me. Then Kay L.J. says: "I cannot find that before or at the time when the plaintiff refused his consent he had offered to buy the lessee's interest for 400*l.* or any sum. . . . . The plaintiff is, therefore, in the position of asserting simply that he is entitled to eject the defendants because they have not got his written permission. That is not the contract. The lessee had a right to assign without his permission if he withheld it unreasonably. Was it reasonable to refuse without making any offer to buy for himself? If he had answered the request for permission by saying, 'I was in treaty with you to buy, and was ready to give the price you asked, and I now offer it to you,' the case might have been different." Counsel for the defendant relied upon those words that in such circumstances—namely, the offer to purchase—"the case might have been different."

That means little more than that the point is open to argument; still, if there had been nothing more, I might perhaps have felt myself constrained by what Kay L.J. said, although the landlord in such a case would have been using the right given to him of withholding his consent merely for the purpose of strengthening and enforcing his right to be a purchaser of the premises. But A. L. Smith L.J. said: "It is conceded by counsel for the plaintiff that if a tenant was desirous of assigning to a friend, it would be unreasonable for the lessor to withhold his assent for the purpose of breaking the lease; but it was said, if it was not to a friend, but to a stranger, and the lessor was willing to pay what the lessee wanted, and as much as he could get from a stranger, it was not unreasonable to withhold his assent in order, if possible, to break the lease, if he wanted

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the premises for himself. That is not my reading of the clause." There the learned judge expresses a definite view on the point in question, and he continues: "Now, when the lessor granted the lease he parted with his interest in the premises for the entire term. The tenant during that term can assign to any respectable and responsible assignee —in which case the lessor is bound not to unreasonably withhold the permission. It is not in my opinion the true reading of this clause that the permission can be withheld in order to enable the lessor to regain possession of the premises before the termination of the term. It was in my judgment inserted alio intuitu altogether, and in order to protect the lessor from having his premises used or occupied in an undesirable way or by an undesirable tenant or assignee, and not in order to enable the lessor to, if possible, coerce a tenant to surrender the lease so that the lessor might obtain possession of the premises, which was the reason why in the present case the assent was withheld."

That is forcible language and applies almost precisely to the present case, and the only difference between the case before A. L. Smith L.J. and this case is that here the defendant alleges that there was a definite bargain for the purchase of the term. But that is denied by the plaintiff, and the defendant is really asserting her right as lessor in order to strengthen her position as purchaser of the premises. In my opinion the landlord is not entitled so to use her power to withhold her assent, but can use that power only to secure herself her proper right not to have an undesirable assignee. I prefer the view of A. L. Smith L.J. to that of Kay L.J. on this point, and in my judgment, the plaintiff is now entitled to assign without any licence from the defendant.

Solicitors for the plaintiff: *Withers, Bensons, Currie, Williams & Co., for Metcalfe & Copeman, Wisbech.*

Solicitors for the defendant: *Field, Roscoe & Co., for H. W. Ward, King's Lynn, Norfolk.*

F. E.

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1921
April 8, 12

In re NICHOLLS.

HUNTER *v.* NICHOLLS.

[1920. N. 851.]

Will—Execution in Chilean Form—"Closed will"—Sealed Envelope—Signature and Attestation on Cover—Signed but unattested Will inside—Validity—Realty in England—Wills Act, 1837 (1 *Vict. c.* 26).

An Englishman who had acquired a domicil in Chile executed a closed or secret will according to the provisions of the Chilean Civil Code before a Notary Public and five witnesses. By that code a closed will was deemed to include the cover which contained it, and that cover was the only document on which the names of the testator, the five witnesses, and the Notary were signed together, the will itself being signed by the testator alone. This closed will, with the cover thus indorsed, was proved or registered in Chile, and letters of administration with the will, including the cover, annexed, were granted to the plaintiff in England, where the testator possessed real property:—

Held, following the reasoning in *In re Almosnino* (1859) 29 L. J. (P.) 46, that the indorsement on the envelope and the document therein enclosed constituted one testamentary disposition, and the testator had executed a will capable of passing his real estate in England.

ADJOURNED SUMMONS.

The testator, James Mayne Nicholls, was born in England, but had acquired a domicil in the Republic of Chile. He returned temporarily to England in 1916, and died in London on March 4, 1917. While in Chile on January 7, 1915, the testator made his will in accordance with Chilean law, and appointed his brother, Charles Wesley Nicholls, and his younger son, Harold Mayne Nicholls, his executors. The will was registered or proved in Iquique on September 7, 1917, by both executors. H. M. Nicholls died in 1918, and C. W. Nicholls executed a power of attorney to the plaintiff, William James Hunter, in pursuance of which administration with the will and cover annexed was granted to the plaintiff in England on February 1, 1919. The testator's estate consisted of personal property in Chile and England of considerable value, and also of real estate in England near Falmouth. By his will as required by Chilean law the testator made all his eight children his universal heirs as to one-half of his estate; as to

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one further quarter he gave it to be divided among his other children, omitting the defendant, Mayne Edward Nicholls, who was his eldest son and heir-at-law, and as to the other quarter as therein mentioned. The other defendant was Alesa Bird representing the devisees under the will. In accordance with the Chilean Civil Code relating to secret or closed wills he signed his will at the foot thereof in secret without witnesses, and placed the same in a sealed envelope which was indorsed with a statement on the cover as follows :—

" *Will.* In Iquique, Republic of Chile, on the 7th day of January, 1915, before me, Francisco Javier Hurtado, Notary Public of this Department, and in the presence of the competent witnesses who will be named at the end hereof appeared Mr. James Mayne Nicholls, a person of full age domiciled in this place who, in my opinion and in that of the witnesses, is in the full possession of his mental faculties, and stated That within this cover or closed and sealed envelope his testamentary dispositions are contained. Thus the Testator stated in the presence of the witnesses Francisco M. Jeffery, Nitrate Merchant, Antonio Zavala, Advocate, Estaban Carcasson, Nitrate Owner, Augustin Arrieta, Advocate, and George W. Wright, Merchant, all persons of full age domiciled in this Port, with exception of Senhor Zavala who resides at Pisagua. This act was read in an audible voice by the undersigned, the Testator and the witnesses all heard it, the whole being carried out in one act. By way of evidence they sign as I certify. J. Mayne Nicholls, Fras. M. Jeffery, Antonio A. Zavala, M. G. W. Wright, E. Carcasson. Before me, F. J. Hurtado. Here is a seal of the Notarial Office."

Article 1021 of the Chilean Civil Code provided as follows : " The solemn, closed, or secret will must be made before a Notary Public and five witnesses." By art. 1023 : " What essentially constitutes a closed will is the act in which the testator hands a closed deed to the Notary and witnesses declaring aloud and in order that the Notary and witnesses can see, hear, and understand him, ... that his will is contained in the closed deed. . . . . The will must be written or at least signed by the testator. The envelope or cover of the

will must be sealed or closed outwardly in such a way as to make the extraction impossible without tearing the cover. It is left to the testator's discretion to affix a seal, or a mark, or make use of any other device he may deem advisable for the security of the cover. The Notary will record on the envelope or cover below the epigraph 'Will,' the fact that the testator is of sound mind, the name, surname, and address of the testator, and of each of the witnesses, also the place, day, month and year of the Act. The Act is completed with the signatures of the testator and those of the witnesses, and also by the signature and seal of the Notary on the cover. During the proceedings the testator must be present together with the same Notary, and there must be no interruption whatever except for brief interval caused by an accident." [Cp. the dispositions of the French Civil Code, arts. 976 sqq., on the form of the "testament mystique ou secret."] In an affidavit by a Chilean barrister he stated that by Chilean law the signatures of the testator and witnesses being on the cover of a closed will were an exact equivalent to such signatures being on the will itself, as the will and cover were the two inseparable parts of the same single document, the reason for the signatures being on the cover being only to prevent the witnesses knowing the actual contents of the will.

The question having arisen whether the document enclosed in the envelope with the cover together constituted the will of the testator according to English law, and if so whether the execution was sufficient to bring it within the terms of the Wills Act, so as to pass real property in England, the trustees issued an originating summons asking: (1.) Whether the plaintiff, as such administrator with the will annexed, was a trustee for the defendant, M. E. Nicholls, as heir at law of the testator, of the real estate of which he died seised in England, or whether such real estate passed to the devisees under the will? (2.) Whether the will was duly executed so as to pass such real estate?

C. A. Bennett for the plaintiff stated the facts and the requirements of the Chilean Code as to a closed will.

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Gover K.C. and *Dighton Pollock* for the defendant, Alesa Bird, one of the devisees under the will. We contend first that the envelope and the document it contains together constitute one testamentary instrument by English law. Secondly, that the execution and attestation of the statement on the cover is by English law a sufficient execution of the whole instrument in accordance with the Wills Act, 1837. The Chilean law is immaterial for the purpose of passing real estate in England. As to the first proposition the envelope and enclosure were so physically attached to each other as to constitute one single document. At the time of the transaction when the indorsement was made on the cover the envelope was already sealed and closed outwardly so as not to be opened without tearing the envelope. A very slight attachment of papers is all that is necessary: *Lewis* v. *Lewis.* (1) In *Allen* v. *Maddock* (2) there was the incorporation of an imperfectly attested testamentary paper, and reference was made to it by a duly attested document. *University College of North Wales* v. *Taylor* (3) shows that the document intended to be incorporated must be properly described. The nearest case to the present is *In re Almosnino.* (4) In that case a signed but unattested testamentary disposition was found sealed up in an envelope on which there was a signed and attested confirmation of the contents of the enclosed document. Both were admitted to Probate. Here the indorsement on the cover commences with the word "Will" and the testator must have recognized that in signing this statement he was executing a portion of the instrument which constituted his will, and he referred to the enclosed "testamentary dispositions." It is not necessary for a will to be made in any particular form. The indorsement on the cover or envelope was itself a testamentary instrument, and was properly executed to pass realty by English law. It is only necessary to establish that the instrument in question purports to be dealing with the making of a posthumous testamentary instrument. Parol evidence is admissible to establish this fact: Jarman on Wills, 6th ed., pp. 33, 35;

(1) [1908] P. 1.
(2) (1858) 11 Moo. P. C. 427.
(3) [1908] P. 140.
(4) 29 L. J. (P.) 46.

In re Barrance (1); *Milnes* v. *Foden* (2); *Whyte* v. *Pollok* (3), where the passage in Jarman as to the form of wills was expressly adopted by Lord Selborne.

The will here is good admittedly as to the personal estate, how can it be differentiated as to real property? The enclosed document being clearly identified, the cover and its enclosure must be read as one: *Smart* v. *Prujean.* (4)

Clayton K.C. and *Gavin Simonds* for the heir at law. There is no will here executed in accordance with the Wills Act so as to pass real estate. The document inside the envelope is not enough: there is no sufficiently attested signature of the testator on it: Jarman on Wills, p. 113. The short question is whether in this envelope you have a sufficient disposition by reference to some other document. This indorsement on the cover is a mere statement by the testator of where his will is to be found. It is not a disposition of his property. Here the disposition has to be found in the incorporated document, and the statements on the envelope negative the suggestion that it is a testamentary disposition. It is merely a detailed statement that the formalities laid down by the Chilean code have been satisfied.

EVE J. [after stating the preliminary facts and the question raised continued:] It appears that according to the Chilean law there are two kinds of wills: the one an open will, the other a closed one. The testator's will was a closed one, and according to art. 1021 of the Chilean Civil Code, "the closed or secret will must be made before a Notary Public and five witnesses." That article has an important bearing on the question I have to determine; read with the articles which follow it shows that according to Chilean law the will includes the cover, that being the only document on which appear the names of the five witnesses and the Notary. The course of procedure is laid down in art. 1023. [His Lordship read the material parts of art. 1023 as set out above and

(1) [1910] 2 Ch. 419.
(2) (1890) 15 P. D. 105, 107.
(3) (1882) 7 App. Cas. 400, 409.
(4) (1801) 6 Ves. 560.

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continued :] The will therefore is signed by the testator alone (it may or may not be written by him), but it is made before the Notary and the five witnesses, and the envelope in which it is contained is the only document signed by the testator, the witnesses, and the Notary. That the will and enclosing envelope are inseparable is further evidenced by the articles which follow those I have read and which deal with registration or probate, after the testator's death. This will was registered or proved in Iquique on September 7, 1917, and on February 1, 1919, letters of administration with the will including the cover annexed were granted in this country. The question in issue turns upon the short point, whether or no the envelope and the document contained in it constitute one testamentary document ? Prima facie the testamentary character of the cover is established by its admission to probate, but it may be that it cannot be construed as disclosing the intention of the maker respecting the destination of his property after his death, and cannot therefore be treated as a testamentary document. On this footing it has been argued that the indorsement on this envelope is nothing more than the record of the proceedings at Iquique, and a mere statement that the will of the testator is to be found within. I do not feel able so to limit its operation. I think the indorsement is a statement by the testator, made in the presence of the adequate number of witnesses, that the document which is therein contained is his will, and that his property is to be disposed of in accordance with the terms of that document. Having regard to the law under which the will was made and the whole transaction took place, it is impossible in my opinion to treat the envelope as divorced from the document which it contains. No question arises as to the identity of the document referred to in the indorsement, and when the testator states, as he has to state immediately before the indorsement on the envelope is signed and attested, that the closed and sealed envelope contains his testamentary dispositions, he is in substance confirming in the presence of the Notary and witnesses the contents of the enclosed document. The case is in my opinion entirely within the reasoning of Sir C. Cresswell

in *In re Almosnino.* (1) The indorsement on the envelope and the document therein enclosed constitute one testamentary disposition, and in these circumstances I hold that the testator has executed a will capable of passing his real estate in this country. I answer the first question, therefore, by saying that the real estate passes to the devisees under the will, and the second question in the affirmative.

Solicitors: *W. J. Hunter; Robbins, Olivey & Lake, for Grylls & Paige, Redruth.*

G. M.

In re HOLT.

HOLT *v.* HOLT.

[1920. H. 2676.]

Will—Construction—Devise of real Estate and bequest of Personalty—Testator possessing Leaseholds but no real Estate strictly so called—Effect of Devise on Leaseholds—Wills Act, 1837 (1 *Vict. c.* 26), *s.* 26.

A testator, whose will was made in 1893 and who died in 1897, gave all his "personal property" in one direction and all his "real estate and property" in another direction. He had no real estate, strictly so called, at the date of his will or at the time of his death, but he had two farms, each of which he held for the residue of a long term of years —one being created in the seventeenth century and the other in the nineteenth century. On an originating summons the question was raised whether the leaseholds passed under the devise of real estate or passed as personal property:—

Held, distinguishing *Butler* v. *Butler* (1884) 28 Ch. D. 66, that s. 26 of the Wills Act, 1837, did not apply, and that, applying the general principles of *Rose* v. *Bartlett* (1631) Cro. Car. 292, the law laid down in which was not, so far as related to the present case, altered by that section, the leaseholds passed under the general devise of real estate.

HENRY JOHN HOLT made his will, dated October 1, 1893, and died on April 25, 1897. The testator was described in the will as "of Biddulph in the County of Stafford, Gentleman."

The material parts of the will were as follows: "I appoint

(1) 29 L. J. (P.) 46.

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my brothers, Robert Alfred Holt, of Bank House, Lichfield, in the said County of Stafford, Bank Manager, and William Holt of Biddulph aforesaid, Sand Merchant (hereinafter called my trustees) to be executors and trustees of this my will. I give and bequeath unto my brother the said William Holt all the personal property, whatsoever and wheresoever, of which I may die possessed or have in expectancy, for his own absolute use and benefit, subject nevertheless to the payment thereout of all my just debts, funeral and testamentary expenses. I give and devise all my real estate and property wheresoever situate unto my trustees, upon trust to pay the rents and annual income arising therefrom unto my brother the said William Holt for and during his life, and, from and after his decease, in trust to pay and divide the same rents and annual income equally between and amongst my two brothers, Robert Alfred Holt and Edward Holt, during their joint lives. And on the death of either of them, the said Robert Alfred Holt and Edward Holt, to pay to the survivor of them the whole of such rents and annual income as aforesaid for his life. And on the death of such survivor, then I give and devise the whole of my said real estate and property unto and to the use of the eldest surviving son of my brother, the said Robert Alfred Holt, absolutely. And I empower my said trustees to sell and dispose of any portion of my said real estate whenever in their discretion they shall think fit and expedient, and to invest the proceeds arising from any such sale in the purchase of other real property the same to follow the trusts of this my will."

The testator was not at the time of his will or of his death possessed of any real estate, but he was possessed of (1.) a leasehold messuage, farm and lands called "Biddulph Park Farm" situate in the Parish of Biddulph, containing about 40 acres, which he held on a lease dated Aug. 21, 1675, for a term of 500 years from that date at a yearly rent of 6*l*., and (2.) a leasehold plot of land at Biddulph Green, in the same parish, containing 3825 square yards, which he held under a lease dated January 2, 1836, for a term of 999 years from the same date at a peppercorn ground rent.

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William Holt died in April, 1899, having by his will devised to Robert Alfred Holt all his real and personal property, upon trust to allow his wife, Martha Holt, to have the use and enjoyment of a house at Penzance, and the furniture therein during widowhood, and to hold the residue of his property upon trust to pay the income to his said wife during her widowhood, and subject thereto and to an annuity to a sister-in-law he directed the residue to be retained by Robert Alfred Holt for his own use and benefit during his life (who was appointed executor) and after his death he gave the whole of his property and estate to the male heir of Robert Alfred Holt.

Edward Holt died in 1913, and Robert Alfred Holt died in February, 1915, leaving Robert Beaconfield Holt his elder son and heir-at-law, he and Clara M. Holt being appointed his executor and executrix.

Clara M. Holt took out an originating summons, to which Robert B. Holt and Martha Holt were defendants, raising the question whether, under the will of H. J. Holt, the leasehold properties passed under the gift of his personal estate or under the gift of his real estate and property.

J. M. Stone for the plaintiff stated the facts and the question involved.

De Montmorency for the defendant R. B. Holt. As the testator had no real estate, the long leasehold terms passed under the devise "of all my real estate" without my having to rely on the word "property." Sect. 26 of the Wills Act, 1837, has not altered the law in a case like this. In *Goodman* v. *Edwards* (1), a case before the Act, a testator devised messuages and tenements containing by estimation 100 acres or thereabouts unto and to the use of his wife during her widowhood and after her death or second marriage he devised "all the said hereditaments and real estate" unto and to the use of his nephew and his heirs for ever—thus using words applicable to real estate only—and he gave his residuary personalty to his wife. Forty acres of the land devised were leasehold,

(1) (1833) 2 My. & K. 759.

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and on the wife's second marriage the question arose whether she continued to be entitled to the forty acres or they passed to the nephew as real estate, and it was held that the nephew took them. In *Rose* v. *Bartlett* (1) R. B., being possessed of four closes of land in Burnham for a leasehold term of 100 years, and seised in fee of other lands and tenements in Burnham, made his will "that my wife Elizabeth shall have Burnhams and the lands thereunto belonging, being three half acres in Lentfeild: and my will is, if she do marry, my son Nicholas shall have Burnhams, and three half acres lying in Lentfeild. . . . . I will and bequeath to my said wife Elizabeth all the rest of my lands lying in the parishes of Burnham and Hitcham during the time of her life, and afterwards to my son Bartholmew." According to the report: "The first question was, whether this lease for years be devised to Elizabeth for life, remainder to Bartholmew? And [it was] resolved, that if a man hath lands in fee and lands for years, and deviseth all his lands and tenements, the fee-simple lands pass only, and not the lease for years; and if a man hath a lease for years, and no fee-simple, and deviseth all his lands and tenements, the lease for years passeth, for otherwise the will should be merely void." By s. 26 of the Wills Act, 1837, "a devise of the land of the testator, or of the land of the testator in any place or in the occupation of any person mentioned in his will, or otherwise described in a general manner, and any other general devise which would describe a customary, copyhold, or leasehold estate if the testator had no freehold estate which could be described by it, shall be construed to include the customary, copyhold, and leasehold estates of the testator, or his customary, copyhold, and leasehold estates, or any of them, to which such description shall extend, as the case may be, as well as freehold estates, unless a contrary intention shall appear by the will." That enactment only altered the law as laid down in the first resolution in *Rose* v. *Bartlett* (1), and the second finding in that case is applicable to the present case. In *Moase* v. *White* (2) testator devised and bequeathed the residue of his real and

(1) Cro. Car. 292. (2) (1876) 3 Ch. D. 763.

personal estate upon trust to convert his residuary personal estate except leaseholds and out of the income of the investments and the rents and profits of the real estate to pay some annuities, and accumulate the residue of the income during his wife's life; and after her death upon trust as to all his "real estate situate at, in, or near Emsworth . . . . and in or near Westbourne," out of the rents and profits during the life of J. T. W. to repair and insure, and pay an annuity, and subject thereto in trust for J. T. W. and his assigns for life, and after his decease to sons successively in tail male, with certain limitations over. The testator had leaseholds for a term of 1000 years, and also freeholds at Emsworth, and leaseholds only, for a term of 900 years, at Westbourne, and Bacon V.-C. held that the leaseholds at both places passed under the devise. In *Butler* v. *Butler* (1) Chitty J. refers to the gift in *Moase* v. *White* (2) as being "in substance of real estate described in reference to locality." In *Butler* v. *Butler* (1) the testator directed his trustees to stand possessed of the annual income and proceeds of his real and personal estate in trust to pay an annuity to his wife for life, and after her decease to stand possessed of his real and personal estates "as to my real estates wheresoever" (except Victoria Park Cemetery) in trust to pay the annual rents and proceeds to two children, "and as to my freehold estate called the Victoria Park Cemetery, and my personal estate wheresoever situated, upon trust to pay the dividends, interest and annual proceeds thereof" to his five daughters. The personal estate included leaseholds for years, and Chitty J. held that they did not pass under the gift of real estates.

[He also referred to *Wilson* v. *Eden*. (3)]

W. P. Spens for the defendant Martha Holt. Sect. 26 of the Wills Act does not apply here, because where there are no freeholds the Act is not wanted. If the word "lands" had been used, or if the locality of the property had been indicated, the leaseholds would have passed. In *Moase* v. *White* (2) there was an indication of locality, as there was in

(1) 28 Ch. D. 66, 75.
(2) 3 Ch. D. 763.
(3) (1848) 11 Beav. 237; (1852) 16 Beav. 153.

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Nelson v. *Hopkins* (1); but a general devise of real estate is not sufficient to pass leaseholds. *Gully* v. *Davis* (2) cannot be considered as an authority after what was said about it in *Butler* v. *Butler*. (3)

SARGANT J. In this case I have to decide the question, what is the effect of a gift by will of "all the real estate and property" of a testator who had not, either at the date of his will or at the time of his death, real estate as strictly so called, but who was entitled to a farm in the parish of Biddulph, which he held on a lease for 500 years from 1675, and land at Biddulph Green, also in the parish of Biddulph, which he held on a lease for 999 years from 1836; and who lived at Biddulph.

The testator's real estate was by his will settled on his brother, William Holt, for his life with remainders over, and his personal estate was given in another direction, and the question is whether, in the absence of the possession by the testator of real estate, strictly so called, the general words of devise will pass the leasehold properties to which I have referred.

Before the Wills Act, 1837, the law, as stated by Mr. Jarman in the first edition of his book on Wills, at p. 616, was as follows: "The next inquiry is, whether property, in which the testator is possessed of a term of years only, will pass by a general devise. The rule, on this subject, of which the early case of *Rose* v. *Bartlett* (4) is the well-known leading authority, is, that 'where a man hath lands in fee and lands for years, and deviseth all his *lands and tenements*, the fee-simple lands pass only, and not the leases for years; but if he hath no fee-simple, the lease for years passeth,'" and in the 6th ed. of the same work, p. 962, the following words are added: "for otherwise the will should be merely void." The only distinction between the general law, as existing before the Wills Act—apart from s. 26, which does not, in my judgment, apply here—and the law under the ambulatory clause of the Act, is that a general devise is not necessarily void merely by reason of the

(1) (1852) 21 L. J. (Ch.) 410.
(2) (1870) L. R. 10 Eq. 562.
(3) 28 Ch. D. 66, 75.
(4) Cro. Car. 292.

testator not having real estate at the date of his will, because he might acquire real estate between that time and the date of his death. Mr. Spens, who argued the case very well, admitted that if the devise had been of "all my land," or of "all my real estate" at a particular place, the leasehold properties would have passed, but he argued that, because there was only a general devise of real estate and not of land, the words were insufficient to pass the leaseholds. It is to be noted that in *Nelson* v. *Hopkins* (1) Kindersley V.-C. held that no difference was made by the fact that the devise was ambulatory. There the testator gave and devised all his freehold and copyhold messuages, farms, lands, tenements, hereditaments and real estate situate at Market Rasen in a certain way. He had no property at Market Rasen except a leasehold estate held for 1000 years, and it was held that the Wills Act might give to the will an effect in the case of such a general devise of real estate which it would not have had prior to the Wills Act, because the testator might have purchased real estate at Market Rasen between the date of his will and the time of his death. In that case the testator referred to his real estate but did not make a devise of lands simpliciter, so in that respect also it was analogous to the present case, but Mr. Spens distinguished it because there was there an association of the real estate with a particular locality.

In my judgment, though I know of no reported case where the words of the will referred not to "land" but to "real estate," a general gift of real estate before the Wills Act would have passed leasehold property to the devisee if the testator had no real estate strictly so called. I base that decision on the general character of the reasoning in *Rose* v. *Bartlett*. (2) The actual decision there was as to lands in a particular locality, but there is also a general rule laid down, with reference to a general devise of lands, that if there be no freeholds, the leaseholds shall pass, the reason being that otherwise the will is merely void, while the general rule is that effect shall be given to all the words of a will if possible.

(1) 21 L. J. (Ch.) 410. (2) Cro. Car. 292.

SARGANT J. 1921 HOLT, *In re.* HOLT *v.* HOLT.

Is any change made in the law affecting a case like this by the Wills Act? In my judgment it is not. Although s. 26 of the Act does not deal with such a case as this, it shows that, the language of the section and its general purport seem to indicate that, apart from the changes thereby expressly made, the law is left as it was before the Act was passed, and that *Rose* v. *Bartlett* (1) would be law after the passing of the Act as well as before, except where there are both real estate and leaseholds. *Gully* v. *Davis* (2), if it were unshaken, would cover the exact point raised in the present case. There the testator gave his real estate upon trust to pay to his housekeeper 12*s*. per week, and the remainder of the rents and profits to be divided as in the will mentioned. He had no freehold estate, but he had leaseholds which he always believed to be of freehold tenure. Malins V.-C. held that the leaseholds were charged with the weekly payment. The decision is unsatisfactory as being founded on a finding as to what was the belief of the testator, but it must not be assumed that there was no other ground for the decision. The estate was small and the case was scarcely argued, and further the decision was adversely criticised by Chitty J. in *Butler* v. *Butler* (3), so I found my decision on general principles. *Butler* v. *Butler* (3) itself was a case in which the testator had other property which might have satisfied the words of gift and therefore the reasoning in *Rose* v. *Bartlett* (1) was not in point there. Mr. Spens did not draw any marked distinction between a general devise of land and a general devise of real estate, and it would be lamentable if the ruling in *Rose* v. *Bartlett* (1) should be confined to "land" or "real estate" in a particular locality and should not apply to a general devise of real estate in a case where the testator had leaseholds only and no real estate strictly so called. I hold, therefore, that the principle of *Rose* v. *Bartlett* (1) applies, and that these leaseholds passed by the devise.

Solicitors for all parties: *G. F. Hudson, Matthews & Co.*, for *H. L. & W. P. Reade, Congleton.*

(1) Cro. Car. 292. (2) L. R. 10 Eq. 562.
(3) 28 Ch. D. 66, 71. F. E.

BROUGH *v.* NETTLETON.

P. O. LAWRENCE J.

[1920. B. 574.]

1921

March 3, 4.

Landlord and Tenant—Parol Tenancy with Option to purchase—Possession taken—Option exercised in Writing—Part Performance—Statute of Frauds—Specific Performance.

A. verbally agreed with B. to grant him a lease of a certain house for $2\frac{1}{2}$ years from October 1, 1917, at a specified rent and that B. should have the option, to be exercised in writing, of purchasing the house at any time during the tenancy for 500*l.* On the faith of this parol agreement B. went into possession of the house, regularly paid rent, and on December 30, 1919, exercised in writing his option to purchase. A. refused to sell the house, alleging that no such agreement existed and that B. was only a yearly tenant at the specified rent; alternatively, he relied on the Statute of Frauds:—

Held, that the possession taken by B. was an act of part performance which enabled him to give evidence of all the terms of the parol agreement for tenancy, and entitled him to specific performance of that agreement including the option to purchase.

WITNESS ACTION.

The defendant was a builder and the owner of some 200 houses of various sizes at Harrogate. He let the small houses verbally on yearly tenancies, for longer tenancies he used a printed common form which contained usual lessee's covenants. In August, 1917, he was building some small houses in Bilton Lane, Harrogate, one of which was nearing completion and was known as "Chez Nous." The plaintiff saw the house, and on August 21, 1917, had a personal interview with the defendant, at which the defendant agreed to let him the house for $2\frac{1}{2}$ years from October 1, 1917, at the rent of 27*l.* 10*s.* per annum with the option of purchasing the house at the price of 500*l.* at any time during the said term upon the plaintiff giving him notice in writing of his intention so to do.

The next day the plaintiff called at the defendant's office. The defendant was not there, and the plaintiff saw Grainge, the clerk in charge of the office. The plaintiff told Grainge that he had taken the house and asked for a tenancy agreement to be made out. Grainge, who had been informed by the defendant that the plaintiff had taken the house, took a printed form and filled in the particulars told him by the

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plaintiff, including the option to purchase. The plaintiff signed the form and then left. Grainge did not sign the form, as he had no authority to let or sell houses. Later the same day Grainge handed the form so filled in and signed by the plaintiff to the defendant. The defendant retained this document without objecting to any of its terms, but did not sign it himself. Grainge left the defendant's employment in September, 1917.

On September 24, 1917, the plaintiff, on the faith of and relying on the parol agreement he had made with the defendant, entered into possession of the house, regularly paid the rent, and was still in possession. On or about October 3, 1919, the plaintiff, in consequence of a notice he had received from the defendant informing him that his rent would be raised after April 1, 1920, called at the defendant's office and asked to see his tenancy agreement in order to make sure of the date when his tenancy expired. The defendant was not there, but the document he had signed was produced to him by a clerk. The plaintiff saw that his tenancy expired on April 1, 1920, and realized that he could not dispute the defendant's notice.

On December 30, 1919, the plaintiff wrote to the defendant exercising his option to purchase the house. The defendant denied that any such tenancy agreement as alleged by the plaintiff existed, and, after some correspondence between their respective solicitors, the plaintiff issued a writ for specific performance, and by his amended statement of claim asked for specific performance of the parol agreement of tenancy containing the option to purchase. By his defence the defendant denied the alleged agreement and pleaded that he verbally let the house in August, 1917, to the plaintiff on a yearly tenancy at 27*l.* 10*s.* per annum; alternatively, he relied on the Statute of Frauds. The defendant, in giving evidence, asserted that he only verbally agreed, if he decided to sell the house, to give the plaintiff the first refusal of it, and that no price was fixed.

Roope Reeve for the plaintiff. The taking possession of the house by the plaintiff was an act of part performance

referable to some agreement which takes the case out of the Statute of Frauds and enables him to give parol evidence of all the terms of the agreement: Fry on Specific Performance, 6th ed., pp. 277, 302; *Sutherland* v. *Briggs* (1); *Tomkinson* v. *Staight* (2); *Nunn* v. *Fabian* (3); *Hodson* v. *Heuland* (4); *Sharman* v. *Sharman*. (5) It is submitted that the plaintiff's parol evidence is borne out by the document he signed, which contains all the terms of the verbal agreement come to between him and the defendant, and that he is entitled to specific performance.

Gavin T. Simonds for the defendant. There is a direct conflict of evidence between the plaintiff and defendant and no clear verbal agreement of an option to purchase the house for 500*l*. But it is unnecessary to consider the conflicting facts, because there is no sufficient memorandum in writing of the contract sued on. It is settled that in order to take a case out of the Statute of Frauds the act of part performance must be unequivocally referable to the verbal contract relied on: *Maddison* v. *Alderson*. (6) Here the plaintiff is really asking for specific performance of a verbal offer to sell the house contained in a verbal agreement for tenancy. The offer could only be accepted by a notice in writing, and the contract for purchase and sale of the house was not constituted until the plaintiff's letter of December 30, 1919, reached the defendant. It is therefore impossible to say that there has been part performance of that contract and that the going into possession of the house in September, 1917, is unequivocally referable to the contract constituted in December, 1919.

Roope Reeve in reply.

P. O. LAWRENCE J. In this case the plaintiff asks for specific performance of an alleged verbal agreement whereby the defendant agreed to grant to him the tenancy of a house at Harrogate for the term of 2½ years at an annual

(1) (1841) 1 Hare, 26, 35.
(2) (1856) 17 C. B. 697.
(3) (1865) L. R. 1 Ch. 35.
(4) [1896] 2 Ch. 428, 435.
(5) (1892) 67 L. T. 834.
(6) (1883) 8 App. Cas. 467, 485.

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rent of 27*l.* 10*s.*, with the option of purchasing the house at the price of 500*l.* at any time during the tenancy on giving the defendant notice in writing of his intention so to do. The defendant denies that he ever made such an agreement, and in the alternative pleads the Statute of Frauds. I will first deal with the question whether the plaintiff has proved that the alleged agreement was in fact made, as to which there is a direct conflict of testimony. [His Lordship then reviewed the evidence, and held that the plaintiff had conclusively established that the alleged agreement had in fact been come to, and proceeded as follows :] There remains to be considered the defence of the Statute of Frauds. In my opinion that defence in the circumstances of this case cannot prevail. The defendant allowed the plaintiff to enter into possession of the house, well knowing that he was doing so on the faith of the verbal agreement which had been come to between them. The defendant had at that time in his possession a document signed by the plaintiff in which the terms of that agreement were fully set forth, so there could have been no doubt in his mind either as to the exact terms or as to the belief of the plaintiff. In these circumstances I am clearly of opinion that the taking of possession of the house by the plaintiff constituted an act of part performance of the agreement, and that the defendant is precluded from setting up the statute. The effect of the removal of the barrier set up by the statute in my judgment is to open the door to parol evidence of the whole agreement, including the term as to the option to purchase. That being so, I should have thought that the case was clear, and that there could be no doubt that the plaintiff was entitled to the relief he claims. Mr. Gavin Simonds, however, has strenuously urged that the plaintiff is not entitled to any relief, and that I ought to dismiss this action. He contends that the agreement which the plaintiff seeks to enforce is not the agreement of August, 1917, but is in truth the contract for sale which was for the first time constituted when the plaintiff gave his notice to exercise the option on December 30, 1919, and that the plaintiff cannot succeed in this action without proving some act of part performance

subsequent to December 30, 1919, and unequivocally referable to the contract for sale then constituted. Although no doubt the object of this action is to compel the defendant to sell the house to the plaintiff, I am nevertheless clearly of opinion that what the plaintiff is seeking to enforce is one of the terms of the agreement of August, 1917—namely, that he should have an option to purchase the house during the tenancy. The granting of such an option amounts in effect to an agreement on the part of the defendant to make a continuing irrevocable offer to sell the house, which offer the plaintiff was entitled to accept at any time during the tenancy, and it is the performance by the defendant of this agreement which the plaintiff now insists upon. It is in my opinion a mistake to say that the exercise by the plaintiff of the option constituted a contract for sale which is independent of the agreement of August, 1917, and that some further act of part performance is required to take such a contract for sale out of the statute before it can be enforced. Assuming that the defendant had entered into a written agreement in the terms of the verbal agreement of August, 1917, it could not be doubted that the plaintiff would have been entitled to enforce the option. Now I have already held that in this case parol evidence is admissible to prove the whole agreement between the parties, including the term as to the option, and that the plaintiff is entitled to enforce the verbal agreement so established, because it has been in part performed by him. In these circumstances the parties are in my opinion placed in precisely the same position as if the whole agreement had been reduced into writing and signed by the defendant. Although the defendant's obligation to sell the house did not become operative unless and until the plaintiff gave his notice to exercise his option, nevertheless such obligation was imposed upon the defendant by the agreement of August, 1917, and by none other. Such obligation was an essential term of the agreement upon the faith of which the plaintiff entered into possession, and can, in my judgment, be enforced without the necessity of proving any further act of part performance just as much as any other term of the agreement could have been so enforced. For

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these reasons I am of opinion that the contention that the taking of possession was an act prior to the agreement which the plaintiff now seeks to enforce and cannot therefore be relied upon as an act of part performance so as to take the case out of the Statute of Frauds has no substance in it. It follows that in my judgment the plaintiff is entitled to the relief he claims in this action.

Solicitors for the plaintiff: *Corbin, Greener & Cook, for Barbers, Harrogate.*

Solicitors for the defendant: *T. D. Jones & Co., for Lomas Walker & Wilkinson, Harrogate.*

H. L. F.

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1921
March 10, 21.

In re DEUTSCHE BANK (LONDON AGENCY).

[1918. D. 918.]

Emergency Legislation—Priority of non-enemy Creditors in Winding Up of Enemy Business—Date of ascertaining Enemy Status—Trading with the Enemy Amendment Act, 1916 (5 & 6 *Geo.* 5, *c.* 105), *s.* 1, *sub-s.* 3.

The provision contained in sub-s. 3 of s. 1 of the Trading with the Enemy Amendment Act, 1916, giving priority of payment, in the winding up of an enemy business, to unsecured creditors who are not enemies continues in force after the coming into operation of the Treaty of Peace signed at Versailles on June 28, 1919. The date at which the enemy or non-enemy character of creditors is to be determined is the date of the winding-up order.

ON July 18, 1918, the Board of Trade made an order under s. 1 of the Trading with the Enemy Amendment Act, 1916, for the winding up of the business carried on in this country by the Deutsche Bank. The controller appointed to conduct the winding up now applied to the Court for directions raising the following questions: (*a*) Does the provision contained in s. 1, sub-s. 3, of the Act of 1916, giving priority of payment to unsecured creditors who are not enemies continue in force after the coming into operation of the Treaty of Peace signed at Versailles on June 28, 1919? and (*b*) If it continues in force

what upon the true construction of sub-s. 3 is the date at which the non-enemy character or enemy character of the creditors is to be determined ? The parties before the Court were the controller as applicant and as respondents the Board of Trade, a representative German creditor, and a representative British creditor. There was also a respondent, the Banque de Bruxelles, as to whom it was suggested that, although a subject of an Allied Power, it was, owing to the German occupation of Belgium, a creditor which was an enemy within the meaning of s. 1, sub-s. 3, of the Act of 1916. The funds in the hands of the controller were insufficient to pay the unsecured debts of all the creditors of the London Agency in full.

Maugham K.C. and *Whinney* for the applicant. The controller holds an even hand and submits the matter to the Court.

[They referred to Trading with the Enemy Amendment Act, 1916, s. 1, sub-ss. 3, 4, 10 ; Treaty of Peace with Germany, Part X., Ss. III., IV., arts. 296, 297 (*a*) (*b*) (*d*), and the Annex, paras. 1, 3, 4, 9, 14, 15 (1) ; *Central India Mining Co.* v. *Société Coloniale Anversoise* (2), *In re National Bank für Deutschland.* (3)] .

Sir Erle Richards K.C. and *J. Beaumont* for the Banque de Bruxelles. The bank is not made an enemy creditor, within the authorities, by reason of its trading within a country occupied by the Germans. The Treaty contemplates windings up being carried to their logical conclusion : art. 297 (*b*). Under the Treaty Germany has to give up her exceptional war rights ; England, as victor, does not : Annex, para. 9. The Treaty does not alter the form of liquidation. Sect. 1, sub-s. 3, of the Act of 1916 gives priority of payment to non-enemies. There is nothing in the Act which says that the liquidation is to be conducted on a different basis or on different lines than hitherto. Peace with Germany, Austria and Bulgaria followed each other. If, therefore, Germany

(1) For relevant provisions of the Treaty see the judgment.

(2) [1920] 1 K. B. 753.

(3) [1921] 1 Ch. 284.

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came on the same footing as non-enemies at the moment of signing the German Treaty, it would give her priority over Austria. So, too, Austria would get priority over Bulgaria, and so on—there would be successive priorities. That cannot be. Priorities do not change according as former enemies cease to be enemies. There cannot be priorities up to a certain date and none after. The meaning of sub-s. 10 of s. 1 of the Act is to preserve rights till the winding up is determined by the Board of Trade.

R. H. Hodge for British creditors. Non-enemies are given priority once and for all. The rights as between non-enemies and enemies crystallized at the date of the winding-up order. Para. 3 of the Annex deals specifically with payment of debts.

Charles K.C. and *F. K. Archer* for German creditors. The case of these respondents is a little difficult to argue: art. 297 (*b*). If the Treaty means what it says, liquidation does not proceed with enemies but is to be in accordance with English law—i.e., between friends as the law was before the war. The term "enemy" is not unchangeable from the beginning of the war, but is changed at the time and by the operation of the Treaty—namely, ipso facto by the Treaty or by virtue of its provisions. The Treaty alters the connotation of the word "enemy"; the basis of enmity is gone by the signing of it. The Treaty of Peace Order, 1919, creates a charge: s. 1, sub-ss. XVI., XVII. After the Order liquidation is to be continued, the controller is to ascertain assets and hand them over to the clearing office without paying debts first. The Treaty puts an end to the status contemplated in the Act of 1916, and non-enemies and enemies are on an equal footing. Art. 297 is unnecessary unless some change took place. This is really, at bottom, a contest between (non-enemy) creditors of a German business and (non-enemy) creditors of Germany generally. Whatever the German creditors take is charged under the Peace Order and goes to the clearing office, so that it does not much matter whether there is priority or not. Whatever course the Court adopts must cause inconvenience. The Treaty intended that everything should pass through

the clearing office. No effect can now reasonably be given to the priority given by s. 1, sub-s. 3. Whatever is found due to German nationals ought to be vested in the clearing office. The crucial time for determining whether a creditor is or is not an enemy is not the date of the winding-up order but is the date of payment. It is desirable that what is done by the Court in this country shall be what will be regarded in all countries as fair, and, if the argument against the German creditors prevails, so that what was law in war is to be now in peace also law, it will not commend itself everywhere.

Gavin Simonds for the Board of Trade. The Board does not wish to take sides but suggests that the crucial date for ascertaining enemies is not that of the winding-up order, because, if it were, there might be non-enemies at that date who subsequently became enemies and yet the controller would under the words of s. 1, sub-s. 3, have to pay them. The Belgian bank comes in equally with British creditors.

March 21. RUSSELL J. [after stating the facts]. There is nothing in the Act of 1916 to suggest that its operation, or the operation of any of its provisions, comes to an end on the signing of peace, or on the coming into operation of a peace treaty, or on the termination of war; on the contrary it contemplates, in my opinion, that a winding up once commenced shall be carried to its conclusion in accordance with the terms of the Act, unless the winding-up order is revoked or varied by the Board of Trade under s. 1, sub-s. 1; and s. 1, sub-s. 10, specifically provides that the winding-up order (with, I presume, all the consequences which it involves) shall continue in force notwithstanding the termination of the war until determined by order of the Board of Trade. No such order has been made. If the priority provision has come to an end it can only be by reason of some provision in the Peace Treaty, the relevant provisions of which have by virtue of the Treaty of Peace Act, 1919, and the Treaty of Peace Order, 1919, acquired statutory effect. The relevant provisions of the Peace Treaty are those contained in Part X., S. IV. (Property, Rights and Interests), which consists of Arts. 297 and

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298 and an Annex. Art. 297 provides as follows: "The question of private property, rights and interests in an enemy country shall be settled according to the principles laid down in this Section and to the provisions of the Annex hereto :—(*a*) The exceptional war measures and measures of transfer (defined in paragraph 3 of the Annex hereto) taken by Germany with respect to the property, rights and interests of nationals of Allied or Associated Powers, including companies and associations in which they are interested, when liquidation has not been completed, shall be immediately discontinued or stayed and the property, rights, and interests concerned restored to their owners, who shall enjoy full rights therein in accordance with the provisions of Article 298. (*b*) Subject to any contrary stipulations which may be provided for in the present Treaty, the Allied and Associated Powers reserve the right to retain and liquidate all property, rights, and interests belonging at the date of the coming into force of the present Treaty to German nationals, or companies controlled by them, within their territories, colonies, possessions and protectorates, including territories ceded to them by the present Treaty. The liquidation shall be carried out in accordance with the laws of the Allied or Associated State concerned, and the German owner shall not be able to dispose of such property, rights, or interests nor to subject them to any charge without the consent of that State. . . . . (*d*) As between the Allied and Associated Powers or their nationals on the one hand and Germany or her nationals on the other hand, all the exceptional war measures, or measures of transfer, or acts done or to be done in execution of such measures as defined in paragraphs 1 and 3 of the Annex hereto shall be considered as final and binding upon all persons except as regards the reservations laid down in the present Treaty." Turning to the Annex, para. 1 provides as follows : " In accordance with the provisions of Article 297, paragraph (*d*), the validity of vesting orders and of orders for the winding up of businesses or companies, and of any other orders, directions, decisions, or instructions of any court or any department of the Government of any of the High

Contracting Parties made or given, or purporting to be made or given, in pursuance of war legislation with regard to enemy property, rights, and interests is confirmed. The interests of all persons shall be regarded as having been effectively dealt with by any order, direction, decision, or instruction dealing with property in which they may be interested, whether or not such interests are specifically mentioned in the order, direction, decision, or instruction. No question shall be raised as to the regularity of a transfer of any property, rights or interests dealt with in pursuance of any such order, direction, decision, or instruction. Every action taken with regard to any property, business, or company, whether as regards its investigation, sequestration, compulsory administration, use, requisition, supervision, or winding up, the sale or management of property, rights, or interests, the collection or discharge of debts, the payment of costs, charges, or expenses, or any other matter whatsoever, in pursuance of orders, directions, decisions, or instructions of any court or of any department of the Government of any of the High Contracting Parties, made or given, or purporting to be made or given, in pursuance of war legislation with regard to enemy property, rights, or interests, is confirmed." The final section of para. 1 is as follows: "The provisions of this paragraph do not apply to such of the above-mentioned measures as have been taken by the German authorities in invaded or occupied territory, nor to such of the above-mentioned measures as have been taken by Germany or the German authorities since November 11, 1918, all of which shall be void." Para. 3 is in these terms: "In Article 297 and this Annex the expression 'exceptional war measures' includes measures of all kinds, legislative, administrative, judicial, or others, that have been taken or will be taken hereafter with regard to enemy property, and which have had or will have the effect of removing from the proprietors the power of disposition over their property, though without affecting the ownership, such as measures of supervision, of compulsory administration, and of sequestration; or measures which have had or will have as an object the seizure

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of, the use of, or the interference with enemy assets for whatsoever motive, under whatsoever form, or in whatsoever place. Acts in the execution of these measures include all detentions, instructions, orders, or decrees of Government departments or Courts applying these measures to enemy property, as well as acts performed by any person connected with the administration or the supervision of enemy property, such as the payment of debts, the collecting of credits, the payment of any costs, charges, or expenses, or the collecting of fees. Measures of transfer are those which have affected or will affect the ownership of enemy property by transferring it in whole or in part to a person other than the enemy owner, and without his consent, such as measures directing sale, liquidation, or devolution of ownership in enemy property, or the cancelling of titles or securities." Para. 9 provides: "Until completion of the liquidation provided for by Article 297, paragraph (*b*), the property, rights, and interests of German nationals will continue to be subject to exceptional war measures that have been or will be taken with regard to them"; and para. 15 provides: "The provisions of Article 297 and this Annex apply to industrial, literary and artistic property which has been or will be dealt with in the liquidation of property, rights, interests, companies or businesses under war legislation by the Allied or Associated Powers, or in accordance with the stipulations of Article 297, paragraph (*b*)."

Those provisions appear to operate as follows: So far as Germany is concerned all uncompleted liquidations by that Power are to cease. The Allies are entitled to complete their liquidations in accordance with their laws: see paras. (*a*) and (*b*) of art. 297. The expression "enemy war measure" in art. 297 and the Annex to s. IV. includes both a present and future measure (legislative, administrative or judicial) of compulsory administration: see para. 3 of the Annex. An act in the execution of such a measure includes payment of debts: see para. 3 of the Annex. The Treaty recognizes as binding future acts done in execution of exceptional war measures: see para. (*d*) of art. 297. Further indications

of this recognition of the continuance in the future of liquidations and administrations by the Allies under their war legislation of German property are to be found in paras. 9 and 15 of the Annex to s. IV. In the face of these provisions it appears to me impossible to hold that any of the provisions for winding up a business under the Act of 1916 have come to an end. They still form part of the statute law of this country; and accordingly the controller is bound to apply the assets in his hands so far as they are available for discharging unsecured debts (following the words of the section): "in discharging such debts due to creditors who are not enemies in priority to the unsecured debts due to creditors who are enemies."

There now remains the question of the construction of s. 1, sub-s. 3, of the Act of 1916. It is said that in consequence of the Treaty of Peace with Germany having come into operation German creditors are now creditors who are not enemies. That is undeniable. But it is further said that they are therefore entitled to be paid pari passu with creditors who have never been enemies at all. In other words, the contention is that upon the true construction of s. 1, sub-s. 3, of the Act of 1916 the point of time at which the class entitled to priority is to be ascertained is the time of actual payment of the debt. If this is so curious results might follow. Priority might depend on many chances, such as the speed of the controller in realization and payment, or the dates of the coming into operation of the various Treaties of Peace; further, where the assets are realized piecemeal and interim dividends are paid on account of debts, a creditor might be an enemy for the purpose of one dividend and not an enemy for the purpose of the next. On the other hand, if sub-s. 3 is read so as to fix the crucial date as the commencement of the winding up (that is to say the date of the Board of Trade order), the classes are ascertainable and fixed at once; the line is drawn and the whole position is crystallized. This is in my opinion the true view—namely, that the crucial date is the date of the order, in this case July 18, 1918. I am fortified in this view by two considerations—namely,

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first, in sub-s. 1, the crucial date for ascertaining enemy nationality or association of the person, firm, or company, is obviously the date of the order. That is the date as at which the liquidation commences and as from which no fresh liabilities in respect of the business can be incurred by such person, firm, or company; and secondly, under sub-s. 3 itself the crucial date relative to preferential payments is by virtue of s. 209 of the Companies (Consolidation) Act, 1908, fixed as the date of the order for winding up. Only one suggestion on the ground of inconvenience was made against this view—namely, that after the date of the winding-up order the case might have arisen of a fresh Power entering the war against the Allies and that (upon this construction of sub-s. 3) a subject of that belligerent Power would retain his priority. This is a point which, had such an event arisen, might well have been covered by an amending Act, but in any event it does not in my judgment outweigh the other considerations mentioned above.

I accordingly decide that the provisions as to priority continue in force notwithstanding the Treaty of Peace, and that the date as at which the class of creditors who are not enemies is to be ascertained is the date of the Board of Trade order—namely, July 18, 1918. Upon this footing I direct the controller to pay the unsecured debts of the Deutsche Bank (London Agency) due to creditors who on July 18, 1918, were not enemies in priority to the unsecured debts of such Agency due to creditors who on that date were enemies.

There is no evidence before me upon which I can act as regards the Banque de Bruxelles for the purpose of deciding within which class that institution falls. As to that the summons had better go back to the Master.

A second summons raised the question whether non-enemy creditors were entitled to be paid any and what interest on their debts in priority to the claims of enemy creditors. It appeared from the evidence that no interest was allowed by the bank on accounts under 50*l.*, but in all other cases interest was allowed at rates fixed by agreement with the customers.

Whinney for the controller. The Court is not asked to lay down any general principle but to give directions as to this particular case.

[He referred to *In re Fried Krupp Actiengesellschaft* (1); *In re Fr. Meyers Sohn* (2); *Warrant Finance Co.'s Case* (3); Buckley on Companies Acts, 9th ed., pp. 472–4.]

Lilley for the Deutsche Bank.

RUSSELL J. Interest allowed by contract or by the custom of the bank appears to me to form part of the debt, and I direct the controller to pay interest to non-enemy creditors in priority to the claims of enemy creditors in all cases where interest was allowed by the bank either by custom or special agreement, and at the rate so allowed.

Solicitors: *Peter Thomas & Clark; Budd, Johnson, Jecks & Colclough; Gush, Phillips, Walters & Williams; J. I. Jonas; Solicitor to Board of Trade; Rehder & Higgs.*

A. L.

In re LORD GISBOROUGH'S SETTLED ESTATES.

[1921. B. 752.]

Settled Land—Capital Moneys—Limitation of Long Term of Years for Portions—Direction to raise Portions in Lifetime of Tenant for Life—Power to apply Capital Moneys—Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *s.* 21 (ii.).

By a settlement dated October 2, 1906, lands and other hereditaments in Yorkshire were settled in the events which happened to the use of trustees for a term of 99 years if G. should so long live upon the trusts therein mentioned, and subject thereto to the use of G. for life, and after his death to the use that his wife should receive during the remainder of her life a yearly rent-charge of 800*l.*, and subject and charged as aforesaid to the use of trustees for the term of 1000 years from the death of G. upon the trusts thereinafter declared with divers remainders over. The trusts of the 1000 years' term were (in the event which happened of G. leaving five younger children), that the trustees "shall," after the death of G. or in his lifetime, at his request in writing raise the

(1) [1917] 2 Ch. 188, 192. (2) [1917] 2 Ch. 201.
(3) (1869) L. R. 4 Ch. 643.

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sum of 25,000*l.* for portions to go to or amongst all or any the younger children of G. and their issue as G. should by deed or will appoint. In a deed dated November 4, 1920, appointing this sum amongst these younger children and their issue, G. requested the trustees to raise this sum by any means authorized by the settlement or by law or preferably (if the law permitted) out of capital moneys; and on January 13, 1921, G. in writing requested and directed his trustees to raise the sum out of capital moneys.

This summons raised the question whether the trustees could and ought to comply with G.'s direction. There was evidence that it was desirable to do so if it was lawfully possible:—

Held, that although s. 21 of the Settled Land Act, 1882, did not sanction the application of capital moneys in the manner directed, the Court would sanction such application subject to the consent being obtained of incumbrancers or persons whose interests had priority to the 1000 years' term, because if, as the trustees were bound to do at the direction of G., they raised the sum of 25,000*l.* by mortgage of the reversionary term of 1000 years, such mortgage would be an incumbrance "affecting the inheritance" within s. 21 (ii.), so that it could at once be discharged out of capital moneys. It was not the practice of the Court to leave trustees to do indirectly what it would involve less expense to do directly.

In re Frewen (1888) 38 Ch. D. 383 applied.

ADJOURNED SUMMONS.

By a deed of settlement dated October 2, 1906, certain manors, messuages, farms, lands and other hereditaments at Guisborough and elsewhere in the county of York were settled (subject to a mortgage to secure 68,000*l.* and interest) to such uses as the Right Honourable Richard Godolphin Walmesley Baron Gisborough (hereafter referred to as Lord Gisborough) and his eldest son, Richard Godolphin Hume Chaloner, should by deed appoint, and in default of and subject to any such appointment to the use of trustees for a term of 99 years if Lord Gisborough should so long live upon the trusts therein mentioned, and from and after the expiration or sooner determination of the said term, and in the meantime subject thereto to the use of Lord Gisborough for life without impeachment of waste, and after his death to the use that if his wife, Lady Gisborough, should survive him, she should thenceforth during her life receive the yearly rent-charge of 800*l.* charged upon and issuing out of the settled hereditaments, and subject and charged as aforesaid to the use of trustees during the term of 1000 years from the death of Lord Gisborough upon

the trusts thereinafter declared concerning the same, and subject thereto to the use of Richard G. H. Chaloner during his life, with remainder to the use of his first and every other son successively according to seniority in tail male, with remainder to the use of Thomas Weston Peel Long Chaloner, the second son of Lord Gisborough, for life, with remainder to the first and every other son of T. W. P. L. Chaloner successively according to seniority in tail male with divers remainders over.

Later the trusts of the 1000 years' term (hereafter called the portions term) were stated to be that if there should be any younger child or children of Lord Gisborough, meaning thereby any child or children who, being a son or sons, should attain the age of 21 years, or being a daughter or daughters should attain that age or marry (other than any son or daughter who, before attaining the age of 21 years or being a daughter marrying, should become entitled to the possession of or to an estate in remainder immediately expectant on the life interest of Lord Gisborough in the settled hereditaments), then the trustees "shall after the death of" Lord Gisborough "or in his lifetime at his request in writing raise by mortgages of the said premises or any part thereof for all or any part of the said term or by and out of the rents and profits thereof or by the sale of timber or minerals or by all or any of the means aforesaid such sums of money as hereinafter mentioned that is to say . . . . if there shall be five or more such younger children the sum of 25,000*l.* and shall hold the same in trust for all or such one or more exclusively of the other or others of the said younger children or the issue of such younger child or children . . . . at such age or time or respective ages or times if more than one in such shares and with such future or other trusts for the benefit of such younger child or children or issue and upon such conditions with such restrictions and in such manner" as Lord Gisborough should by deed or will appoint, and in default of appointment upon trusts as therein mentioned with a proviso that in case Lord Gisborough should require any of the portions for younger children to be raised in

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his lifetime he should be bound to keep down the interest on the sum or sums raised.

Certain personal property was by the same settlement settled upon trust for sale, and to invest the proceeds of sale in lands to be settled in like manner as the freehold lands thereby settled. The trustees of the portions term were also appointed to be trustees of the settlement for the purposes of the Settled Land Acts, 1882 to 1890.

Lord Gisborough had only been once married, and by this marriage had six children, all of whom attained the age of 21 years. His eldest son died in July, 1914, without leaving a son.

By deed dated November 4, 1920, Lord Gisborough requested the trustees by all or any of the means authorized by the settlement or by law, and preferably (if the law permitted) out of capital moneys, to raise as soon as practicable and so far as practicable during his lifetime the sum of 25,000*l.* for portions, and to apply the same upon trust as to 5000*l.* for his younger son, Thomas Weston P. L. Chaloner, for life as therein mentioned, and as to the remaining 20,000*l.* and after his younger son's death the further sum of 5000*l.* also upon trust for his four daughters in equal shares, the share of each daughter to be settled upon trust for such daughter for life, and after her death for the children of such daughter as therein mentioned.

By writing under his hand dated January 13, 1921, Lord Gisborough requested and directed the trustees to raise and pay out and apply any moneys or investments then or from time to time thereafter held by them as trustees of the settlement and being money applicable as capital money under the Settled Land Acts or under the settlement in or towards payment of the sum of 25,000*l.* for portions.

This summons was taken out by the trustees of the settlement to have it determined whether they could lawfully and ought to comply with this direction of Lord Gisborough as tenant for life.

The settled property was subject to various mortgages, and it was admitted that the capital moneys could only be applied

in payment of these portions with the consent of the mortgagees and of any other persons interested in the settled property in priority to the portions term of 1000 years.

The evidence on behalf of the trustees was that having regard to the state of the money market it would be difficult to raise the sum of 25,000*l*. by a mortgage of the reversionary terms of 1000 years, and that it would not be possible to do so except at a high rate of interest; and that it was impracticable to raise this sum or any substantial part of it by any of the other modes expressly authorized by the settlement, as there was no sufficiency either of rents and profits or of available timber or minerals for that purpose.

Devonshire for the trustees.

J. W. F. Beaumont for the tenant for life. It is admitted that if it is lawfully possible to satisfy the portions out of capital moneys, this should be done. The question is whether it is possible under the Settled Land Act, 1882, s. 21. It is not suggested that it is expressly sanctioned by that section, but that it is legally possible indirectly, and if so that the Court should sanction its being done directly. It is clear that under the settlement the portions must be raised by the trustees in Lord Gisborough's lifetime, if he so requests. This he has done, and the only available method of raising it is by mortgage of the reversionary term of 1000 years. It has been decided that a reversionary term can be mortgaged: *Massy* v. *Lloyd*. (1) If so raised, this mortgage would constitute an incumbrance "affecting the inheritance of the settled land, or other the whole estate the subject of the settlement" within s. 21 (ii.) of the Act: *In re Frewen* (2); *In re Esdaile*. (3) It is true those cases related to terms vested in possession and not reversionary terms, but the reasoning of North J. in *In re Frewen* (2) is equally applicable to a reversionary term.

It follows therefore that under s. 21 (ii.) capital moneys could be applied in reducing the incumbrance so that in this

(1) (1863) 10 H. L. C. 248. (2) 38 Ch. D. 383.
(3) (1886) 54 L. T. 637.

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indirect manner capital moneys would be applicable in providing the portions. The Court will allow trustees to do directly what they could in this way do in two steps, and so save them unnecessary expense.

Devonshire for the trustees. A jointure rentcharge is not an incumbrance "affecting the inheritance" within s. 21 (ii.): *In re Duke of Manchester's Settlement.* (1) The portions term is, it is submitted, in the same position. *In re Frewen* (2) is distinguishable because the term was not reversionary. On a mortgage of a reversionary term it is not possible to foreclose and convert the term into a fee simple, as it is in the case of a long term in possession: see s. 65 of the Conveyancing Act, 1881. A reversionary term, until it falls into possession, is a mere interesse termini.

RUSSELL J. This is an application by the trustees for the purposes of the Settled Land Acts of a settlement of certain estates in Yorkshire, and the respondent to the application is the tenant for life of the settlement, Lord Gisborough. The object of the application is to have it determined whether the applicants, as such trustees, can lawfully, and ought, to comply with the direction of the tenant for life to apply capital moneys in the trustees' hands arising under the Settled Land Acts in or towards raising, or providing, a sum of 25,000*l.* in respect of portions for younger children. The case depends, to my mind, very largely upon the actual provisions in this particular settlement. [His Lordship read the material parts of the settlement.] The clause containing the trusts of the 1000 years' term therefore requires the trustees, if Lord Gisborough in his lifetime requests them so to do, to raise this sum of 25,000*l.* either by a mortgage of the 1000 years' term, which means by mortgage of a reversionary term, or by the sale of timber or minerals, or by and out of the rents and profits from the settled estates. The evidence is that the latter two means are hopelessly impracticable, and that even if it was done by mortgage, the rate of interest would be very high. This application is made to me with a view of

(1) [1910] 1 Ch. 106. (2) 38 Ch. D. 383.

ascertaining whether the trustees, instead of having recourse to the methods of raising the 25,000*l.* which are set out in the settlement, may apply for that purpose capital moneys in their hands under the Settled Land Acts. They have, in point of fact, at the moment not sufficient capital moneys for the purpose; but they are anxious, and everybody is anxious, if it can be done, to apply such capital moneys as they have available in, or towards, raising this 25,000*l.*

Whether that can be done depends upon the provisions of the Settled Land Act, 1882. Sect. 21 provides how capital moneys arising under the Act can be applied: "Capital money arising under this Act, subject to payment of claims properly payable thereout, and to application thereof for any special authorised object for which the same was raised, shall, when received, be invested or otherwise applied wholly in one, or partly in one and partly in another or others, of the following modes." The first of these modes is in investments in various securities, and the second is: "In discharge, purchase, or redemption of incumbrances affecting the inheritance of the settled land, or other the whole estate the subject of the settlement." Various other modes of application are indicated, but none of them are applicable to the present case. In terms, there appears in this section no power to apply capital moneys in raising portions, but it is said that it can be done in an indirect way, and that if it can be done in an indirect way, the Court will authorize the trustees to do it directly and not leave them to take two steps to reach the same point as they could have reached in one step. The way suggested is this. It is said that it is the duty of the trustees under the settlement, and I agree that it is, to raise this 25,000*l.*, if and when called upon by Lord Gisborough in his lifetime, by mortgage of the reversionary term. If that were done there would be at once brought into existence an incumbrance. It is then said that this would be an incumbrance "affecting the inheritance of the settled land, or other the whole estate the subject of the settlement," and that, that being so, the applicants could come to the Court the day after the mortgage had been created and ask the Court to

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sanction the application of capital moneys in paying off the incumbrance. Therefore, it is said, the only result achieved would be that, instead of raising the portions directly out of capital moneys, the trustees would, first of all, have to incur the expense of a mortgage which after a brief existence of only twenty-four hours would be paid off out of capital moneys. It is argued that the Court ought not to insist upon these two steps being taken if one is enough.

The first point of which I have to satisfy myself is that the trustees would be entitled to raise 25,000*l.* by means of a mortgage of a reversionary term. In my opinion the words of this particular settlement make it quite clear that they would be bound so to do, but if there were any doubt about it on the settlement, a statement of Lord Westbury in *Massy* v. *Lloyd* (1) to which I have been referred would put it beyond question. Lord Westbury said: "In the argument in this House, and in the Court in Ireland, great reliance was placed on decided cases; but I think little is to be gained from them beyond, first, the general conclusion that the question as to the time when portions become payable depends on a correct construction of the language of the settlement, or in the words of Lord Chancellor Talbot (2), on the particular penning of the trust; and, secondly, the conclusion which Lord Eldon seems to have intended to express (for there is some want of grammatical accuracy in the words imputed to him), namely, that if the interests are vested,"—that is the present case—"and the contingencies have happened at which the portions are to be paid,"—that, again, is the present case—"the interest is payable and the portions must be raised, although the only means of raising them may be the sale or mortgage of a reversionary term. The intention is to govern, and when the period has arrived at which a portion is clearly directed to be raised and paid, you must raise it, although the act of doing so involves a considerable sacrifice and waste of property."

Having gone so far, the next question to be determined is

(1) 10 H. L. C. 248, 262.
(2) *Hebblethwaite* v. *Cartwright* (1734) Cas. temp. Talb. 30, 32.

whether, assuming such a mortgage was created, that would be an incumbrance "affecting the inheritance of the settled land, or other the whole estate the subject of the settlement." There I am assisted by a decision of North J. in *In re Frewen.*(1) In that case the mortgage was in point of fact a mortgage of a term in possession and not a reversionary term, but it appears to me that the reasons given by the learned judge for holding that such a mortgage was an incumbrance "affecting the inheritance of the settled land, or other the whole estate the subject of the settlement," apply with equal force to the case of a reversionary term. The headnote is this: "The proceeds of settled land sold by the tenant for life under the Settled Land Act, 1882, can be applied in paying off a debt secured by a mortgage of a long term." It was "a summons by the tenant for life of settled land that the trustee in whose hands were the invested proceeds of the sale of part of the settled land might be ordered to raise and pay out of such proceeds a sum of 500*l.* in part payment of a debt secured by a mortgage of part of the settled land for a term of 2,000 years, and a sum of 9*l.* 9*s.* 4*d.*, mortgagees' costs, and the costs of the application. The land was settled by the will of Thomas Frewen, deceased. The mortgage was made by the trustees of a term of 2000 years created by the will to secure portions. 100*l.* has been paid off. On account of the fall in rents the mortgagee required either a further sum of 500*l.* to be paid off or a re-valuation. There was evidence that the sale of part of the estate subject to the mortgage would injuriously affect the rest of the estate. The summons had been adjourned into Court for the purpose of arguing the question whether a mortgage of a long term was an incumbrance affecting the inheritance within the meaning of s. 21, sub-s. 2, of the Settled Land Act, 1882." North J. said: "I think the construction . . . . contended for is the correct one, though I cannot say the question is wholly free from doubt. My difficulty is twofold: first, from the words of the section providing that the incumbrance to be paid off must be one affecting the inheritance or other the whole estate the subject

(1) 38 Ch. D. 383, 384.

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of the settlement, whereas a mortgage of a term carved out of the inheritance is not on the whole estate; and secondly, because, if a mortgage for a term of years affects the inheritance, it must equally do so whether the term be long or short, and whether made to secure portions, jointure, or pin money; and it is difficult to see how an incumbrance in respect of pin money or a jointure secured by a term could properly be discharged out of capital money arising under the Act. But in the present case there are two reasons which induce me to come to the conclusion that the mortgage is a mortgage affecting the inheritance. One reason is because the mortgagee might foreclose, and if he did, he would have the power of acquiring the fee, as being possessed of a long term not subject to any equity of redemption; and if he did acquire the fee, I do not see how it could be said that his incumbrance was not one which did affect the inheritance." Every word of that applies to the present case with this one distinction only, that it might here happen that the mortgagee when he foreclosed might have to wait for a time before he could enlarge his estate into an estate in fee simple. That would depend upon whether Lord Gisborough was alive or dead at the time of foreclosure. But it appears to me that for the purpose of testing the question whether the mortgage of the reversionary term is an incumbrance affecting the inheritance it is immaterial that the mortgagee if he foreclosed might or might not have to wait for an interval of time before he could enlarge the term. The mere fact that the mortgage I am considering creates the possibility of foreclosure plus enlargement of the term into a fee simple appears to me to bring it within North J.'s decision, with the result that it is an incumbrance which affects the inheritance of the settled land. Then the learned judge proceeds: "The second reason is that the tenant for life has power of selling the entire fee free from incumbrances, and unless this incumbrance is one which can be paid off, I do not see how that can be done: and the object of the Settled Land Act is that as between the persons interested in the estate, on the one hand, and the purchaser of the estate on the other, the tenant for life is to have absolute

power to bind everybody interested with him in the estate, and make a conveyance of the fee free from incumbrances." There, I think the learned judge is referring to the provisions of s. 20 of the Settled Land Act, which provide that the tenant for life on a sale may convey settled land for the estate or interest, the subject of the settlement, and (sub-s. 2) that: "Such a deed, to the extent and in the manner to and in which it is expressed or intended to operate and can operate under this Act, is effectual to pass the land conveyed, or the easements, rights, or privileges created, discharged from all the limitations, powers, and provisions of the settlement, and from all estates, interests, and charges subsisting or to arise thereunder, but subject to and with the exception of, amongst other things, 'All such other, if any, estates, interests, and charges as have been conveyed or created for securing money actually raised at the date of the deed.'" This would be a case of money "actually raised at the date of the deed," and unless this can be paid off out of the capital moneys at the request of the tenant for life it seems to me it is, as North J. says in *In re Frewen* (1), impossible to see how the tenant for life could give effect to his power of selling the entire fee free from incumbrances. It appears to me, therefore, that both the reasons which induced North J. in *In re Frewen* (1) to hold that a mortgage of a term of years in possession created an incumbrance affecting the inheritance of the settled land apply equally to the case where the mortgage is a mortgage of a reversionary term. The same view was, I think, adopted by Chitty J., again as regards a term in possession, in *In re Esdaile* (2), but that case does not, in my opinion, carry the matter any further than the decision of North J. in *In re Frewen*. (1)

I have therefore come to the conclusion that it would be open to the trustees to raise the 25,000*l*. by way of a mortgage of the reversionary term, and then to come to the Court and ask to be allowed to apply capital moneys in payment off of that mortgage; and that the Court would undoubtedly accede to this application. It is not, I apprehend, the practice

(1) 38 Ch. D. 383. (2) 54 L. T. 637.

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of the Court to force trustees to go through useless and expensive proceedings when the result of taking one direct step instead of two that are indirect will be the same, and will save that expense.

The result is that, although s. 21 does not in terms authorize the application of capital moneys in payment off of sums charged by way of portions, I feel justified in this present case and in view of the particular trusts contained in the settlement, in authorizing the trustees so to apply the capital moneys in order to avoid the expense of having a mortgage prepared and executed that would be immediately paid off out of capital moneys. Accordingly in answer to the summons I will declare that the trustees can and ought to comply with the direction of the tenant for life to apply capital moneys in their hands arising under the Acts in or towards raising or providing a sum of 25,000*l.* appointed by the respondent for portions under the power contained in the will.

I will only add this, that the evidence shows that there are in fact in existence mortgages which have priority to this 1000 years' term. Of course the consent of those incumbrancers and of anybody whose interest has priority to the 1000 years' term must be obtained by the trustees before this order will apply.

Solicitors : *Pontifex, Pitt & Co.*

H. C. G.

EVE J.
1921
April 12, 13.

In re BACKHOUSE.

FINDLAY *v.* BACKHOUSE.

[1920. B. 4962.]

Will—Settlement of a Picture—Limitations—Successive Life Interests—Ultimate Remainder—Construction—Rule against Perpetuities.

A testator bequeathed a picture to his eldest son J. for life, and then to his second son C. for life, and then to his daughter M. for life, and after her death to the first and every other son then living of J. successively, according to seniority for their respective lives, and then to the first and every other son then living of C. successively according to seniority for their respective lives, and then to the first and every other son of his daughter M. successively according to seniority for their respective lives, and then to his own right heirs, it being his strong desire that the picture should not be sold but should always remain in the possession of some descendant of Mrs. C. F. of T. The testator devised the residue of his real and personal estate upon trust for his two sons, J. and C., in equal shares, absolutely. On the death of the testator on June 7, 1906, the executors handed the picture to the eldest son, Sir J., and on his death on July 27, 1918, they gave it to C. who now held it. By clause 6 of his will Sir J. gave to his daughter, Lady F. all his pictures other than those made heirlooms, and by clause 23 he gave "my pictures" at R. to be enjoyed as heirlooms with settled real estate. By clause 36 of his will he left his residuary estate to his three sons in certain proportions. A deed of family arrangement, dated March 5, 1919, was entered into between the children of Sir J. and the executors and trustees of his will, wherein it was recited that the pictures at R. should be treated as having passed to Lady F. under clause 6 of the will, and clause 23 was (inter alia) revoked in pursuance of a power contained in the will. Questions were raised as to the validity of the limitations in the settlement of the picture, and who was now entitled to it:—

Held, that the bequests of the picture were only good so far as they included the sons of Sir J. living at the death of M., and all the subsequent limitations, including the ultimate gift to the right heirs of the testator, were void for remoteness.

Held further, that subject to the valid life interests the picture formed part of the residuary estate of the testator and went to his two sons in equal shares; and the interest of Sir J. in his undivided moiety of the picture passed under his will and the deed of family arrangement to Lady F.

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The plaintiffs in the action were Sir John Richard Findlay, K.B.E., and William Welsford Ward, the surviving executors and trustees of the will of Edmund Backhouse, and

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Sir J. R. Findlay was also one of the executors and trustees of the will of Sir Jonathan Edmund Backhouse. The defendants were Charles Hubert Backhouse, a residuary legatee under the will of E. Backhouse, and other defendants were interested as legatees for life successively in remainder under the said will, or as residuary legatees thereunder or under the will of Sir J. E. Backhouse. By his will, dated February 4, 1906, Edmund Backhouse, of Trebah, Falmouth, in the county of Cornwall, appointed Sir John Richard Findlay and William Welsford Ward, and Edward Hutchinson (who died on April 28, 1918) his executors and trustees, and after making certain pecuniary and specific bequests, and bequeathing certain annuities, bequeathed a picture of Julia Mott at the age of twelve, painted by Gainsborough in 1776, in the following terms: "I bequeath the picture at Trebah belonging to me painted by Gainsborough to my said son, Jonathan Edmund Backhouse, for his life, and then to my said son Charles Hubert Backhouse, for his life, and then to my said daughter Millicent Evelyn Rogers for her life, and after her death to the first and every other son then living of the said Jonathan Edmund Backhouse successively according to seniority for their respective lives, and then to the first and every other son then living of the said Charles Hubert Backhouse, successively, according to seniority for their respective lives, and then to the first and every other son of my said daughter Millicent Evelyn Rogers successively, according to seniority, for their respective lives, and then to my own right heirs, it being my strong desire that such picture shall not be sold, but shall always remain in the possession of some descendant of Mrs. Charles Fox of Trebah." The testator devised the residue of his real and personal estate to his executors upon trusts for sale and conversion, and after providing for the setting aside of certain funds for the benefit of some of his children he directed his executors to stand possessed of his residuary estate upon trust for his two sons, Jonathan Edmund Backhouse, and Charles Hubert Backhouse, in equal shares, absolutely. On the death of the testator on June 7, 1906, the executors handed over the Gainsborough

picture to his eldest son, Sir Jonathan Edmund Backhouse, who held it until his death on July 27, 1918, at "The Rookery," Middleton Tyas. It was then handed over to the testator's second son, Charles Hubert Backhouse, and it was now in his possession. By his will dated July 25, 1918, Sir J. E. Backhouse appointed the defendants, James George Cotton Minchen, and Sir John Richard Findlay and his son, Captain Oliver Backhouse, executors and trustees. By clause 6 of his will he gave to his daughter, the defendant Harriet Jane Lady Findlay, wife of Sir J. R. Findlay, "all my furniture, linen, china, glass, books, manuscripts, prints, pictures (other than those made heirlooms)." By clause 10 he devised his freehold property known as "The Rookery" to the use of his son Edmund for life and then to his first and every other son born in his lifetime successively; and by clause 23 he bequeathed to his trustees "my pictures at the Rookery (particulars of which I propose to set forth in a schedule later), my bust of Sarah Hustley Fox, the writing desk of my grandfather, Charles Fox," and certain other pieces of furniture upon trust to permit the same to devolve and be enjoyed as heirlooms with the hereditaments first devised, but so that the same should not vest absolutely in any person thereby made tenant in tail male, or in tail by purchase who died under the age of twenty-one, but on the death of any such person before attaining an absolute vested interest in the heirlooms the same should devolve in the same manner as if they had been freehold of inheritance and included in the hereditaments first devised. By clause 36 the testator left the residue of his property as to one half to his son Miles Backhouse, as to one quarter to his son Oliver, and as to one quarter to his son Roger, subject as therein mentioned. The testator did not execute any testamentary disposition or make any schedule giving particulars of the pictures he desired to bequeath as heirlooms, in accordance with the intention expressed in clause 23. A deed of family arrangement and resettlement was entered into on March 5, 1919, between Sir Jonathan Backhouse's children and his executors, in which it was recited that the parties had agreed that the

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pictures at the Rookery had not become heirlooms but should be treated as having passed to Lady Findlay under the gift contained in clause 6 of the testator's will; and, amongst others, clause 23 was revoked in pursuance of a power to that effect contained in clause 27 of the will. A sale of the Gainsborough picture was now desired. The trustees of the will of Edmund Backhouse took out an originating summons asking: (1.) Whether any and which of the interests created by the bequests of the picture in the will of Edmund Backhouse, and in particular the limitations in favour of the sons of C. H. Backhouse and the subsequent limitations were void for perpetuity. (2.) If the ultimate remainder in the picture was void whether the picture, subject to such life interests therein as were valid, fell into the residuary personal estate of the testator, Edmund Backhouse. (3.) Whether the interest of Sir Jonathan Backhouse in the ultimate remainder in the picture passed on his death to his daughter, Lady Findlay, under clause 6 of his will or under clause 23 as an heirloom, or to his residuary legatees under clause 36, or in what manner and to whom?

Brydges, for the trustees of the will of Edmund Backhouse, stated the provisions of the two wills and the facts.

Cleveland-Stevens for the first defendant, Charles Hubert Backhouse. I claim a moiety of the picture under the will of Edmund Backhouse subject to the prior life interests of the children, and of the sons of Sir Jonathan, on the ground that the subsequent limitations to the children of children are void for remoteness. Alternatively, on the ground that they are executory limitations and not remainders, and if remainders they are contingent remainders and bad. On the death of Millicent all the sons of Jonathan might not have been born, if he had survived her. Gray on Perpetuities, 3rd ed., pp. 65, 69; and s. 251, p. 239. *Foley* v. *Burnell.* (1) *In re Tritton* (2), *In re Thynne* (3), Williams on Settlements, p. 246; Goodeve's Law of Personal Property, 2nd ed., p. 8;

(1) (1783) 1 Bro. C. C. 274, 278. (2) (1889) 61 L. T. 301.
(3) [1911] 1 Ch. 282.

Williams' Personal Property, 17th ed., p. 393; Fearne on Contingent Remainders, 10th ed., pp. 401, 503. The limitations in the will to the children of Charles and Millicent are not remainders either vested or contingent but are executory limitations and void. The ultimate remainder to the testator's right heirs is also void as too remote: Gray on Perpetuities, p. 239; *In re Mortimer* (1); *In re Ashforth.* (2)

Harman for Wilfred Edmund Rogers, a grandchild of Sir Jonathan. The absolute interest in the picture is vested at the first testator's death in his right heirs, and it does not matter how many prior life interests are given; they are all good and the law as to perpetuities is inapplicable. The ultimate gift to the person entitled operates by way of transmissibility on the testator's death and there is nothing contingent about it. The words of the gift are that after the death of Millicent the picture is to go to the first and every other son "then living" of Jonathan and that is a perfectly good gift, and then to the first and other son then living of Charles and then to the sons of Millicent. The persons are thus ascertained within a life in being and twenty-one years after, and they must be all ascertained, it is submitted, on the death of Millicent and take vested interests. Theobald on Wills, 7th ed., p. 604: *Stuart* v. *Cockerell* (3); *Evans* v. *Walker* (4); *In re Roberts* (5); Gray on Perpetuities, p. 608, s. 851 (Appendix).

Edward Beaumont, for the three residuary legatees under the will of Sir Jonathan. Some of the children of Charles might have been born after the death of the first testator, as the words "then living" in the limitations to the sons of Charles must, it is submitted, mean after all the sons of Jonathan had died, and the gifts to the sons of Charles are void for remoteness. The chain therefore is broken and the ultimate limitation to the testator's right heirs is also void, being a remainder following a limitation void for perpetuity: Theobald on Wills, 7th ed., p. 604; *In re Mortimer* (1); Gray

(1) [1905] 2 Ch. 502.
(2) [1905] 1 Ch. 535.
(3) (1869) L. R. 7 Eq. 363.
(4) (1876) 3 Ch. D. 211.
(5) (1881) 19 Ch. D. 520.

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on Perpetuities, 3rd ed., p. 239, where he alters the opinion expressed in a former edition.

S. Leeke for Lady Findlay. I claim the entirety of the picture subject to the prior life interests. The words "and then" in the gift in the will of Edmund Backhouse after the death of Millicent should be read as "subject thereto." The children of Jonathan, Charles, and Millicent would then all take life interests before the picture goes to Jonathan as the testator's right heir. There is, I submit, no question of contingent remainder or executory gifts but simply successive life interests, and all the limitations are valid.

Rabagliati for John Edmund Backhouse, an infant grandchild of Sir Jonathan. The words "then living" in the gifts to grandchildren must refer to the death of Millicent. The Court has to give effect to the clear intention of the testator, and always leans to the earliest possible date of vesting.

EVE J. It is quite obvious on reading the will of the testator that his predominant intention was to keep this picture in the family as long as he could, and in order to effectuate this he has endeavoured to create a series of successive interests therein in favour of his children and grandchildren. The question is whether, in so doing, he has overstepped the rule against perpetuities in his dispositions of the picture after the death of his three children. No one has suggested that the gifts for life to his children successively are bad, but the testator has assumed that the children will depart this life in accordance with seniority, and on this assumption he treats his daughter as the survivor, and on her death bequeaths the picture to the first and every other son then living of his son Jonathan, successively according to seniority for their respective lives. There can be no doubt that the class of sons to take under this gift is limited to the sons of Jonathan living at the death of their aunt, Millicent. If Jonathan survived Millicent and after her death had another son born to him such son would take no interest in the picture. The gifts to the sons of Jonathan living at Millicent's death are not impeached, but after these life interests are determined

life interests are given to the first and every other son then living of the testator's son, Charles, successively according to seniority, and the question is does the expression "then living" mean living at the death of Millicent, or at the death of the last son of Jonathan, who takes a life interest under the preceding gift? But for the interesting argument to which I have listened I should have thought the point unarguable. The sons of Charles whom the testator contemplates are those who shall be living at the moment when their interests spring into being, that is to say on the death of the last surviving son of Jonathan capable of taking under the preceding bequest. On this construction the gifts to the sons of Charles are obviously void for remoteness, and the subsequent limitations including the ultimate gift to the testator's right heirs all fail. Subject therefore to the gifts for life to the testator's children and to the sons of Jonathan living at Millicent's death, the picture passes under the residuary bequest in moieties to the residuary legatees.

The third question was then argued.

Brydges. The question now is what becomes of Sir Jonathan's one undivided moiety of the picture, whether it passes under clause 6, or clause 23 of his will, or forms part of his residuary estate passing under clause 36, or is undisposed of?

S. Leeke for Lady Findlay. This one moiety of the picture goes to Lady Findlay under the will of Sir Jonathan and the agreement by way of family arrangement which recites the conclusion arrived at as to the pictures.

Edward Beaumont for the trustees of the will of Sir Jonathan and the residuary legatees thereunder. The picture falls into the residue under the will of Sir Jonathan, as this testator has not, as I submit, attempted to dispose of it by the clauses in his will, either 6 or 23. Nor does the deed of compromise and family arrangement really affect it. The deed would have been differently framed had the parties realized the interpretation which has been put upon the limitations as to the picture in Edmund's will.

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EVE J. I cannot bring myself to hold that Sir Jonathan's interest in this picture passed under the residuary bequest in his will. It was a valued family possession in which his father had unsuccessfully endeavoured by his testamentary dispositions to create limitations ensuring its retention in the family for a lengthened period. There can, I think, be no doubt that Sir Jonathan regarded himself as the person to whom the picture would eventually come under the ultimate gift in his father's will. By clause 6 of his own will he bequeathed all his pictures, other than those made heirlooms, to the lady who is now Lady Findlay, and by clause 23 he bequeathed to his trustees his pictures at the Rookery—which would include the Gainsborough—so that the same should devolve and be enjoyed as heirlooms with certain real estate settled by the earlier part of his will.

It is said that the testator could never have contemplated dealing with his undivided moiety in the picture as an heirloom and therefore it is impossible to treat it as passing under clause 23 of the will, but this argument is founded on the assumption that the testator appreciated the fact that his interest in the picture was limited to a moiety. There is no evidence in support of that assumption, and as I have already observed I think there is no doubt that the testator believed that the picture would ultimately come to him in accordance with his father's intention as expressed in his will. I come therefore to the conclusion that it was included in the bequest contained in clause 23 of the will. But by the deed of March 5, 1919, the trusts of the will including the trusts of clause 23 were pursuant to the power in that behalf conferred upon certain individuals by clause 27 of the will, revoked, and new trusts were substituted therefor, and amongst other things it was thereby agreed that the pictures dealt with in clause 23 should be treated as included in the bequest in clause 6.

What is the effect of that agreement? To give to Lady Findlay the testator's interest in the Gainsborough. That seems to me to be inevitable. It is said that if the parties to the deed had appreciated the true destination of the Gainsborough and the results which follow from the construction

which has now been imposed on Edmund's will the deed would have assumed a different form. I think that it is quite possible a bargain might have been made with Lady Findlay and the owner of the other moiety that this picture should be treated as an heirloom, but that is a matter into which I cannot enter to-day. All I hold is that on the true construction of the testator's will and the deed Lady Findlay is now entitled to his undivided moiety in the picture, subject to all prior validly created interests therein.

Solicitors: *Howe & Rake, for Lucas, Hutchinson & Meek, Darlington; Minchin, Garrett & Co.*

G. M.

In re PONDER.

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[1920. P. 1409.]

Trustee—Intestate's Estate cleared of Debts and Administration—Power of Court to appoint new Trustee jointly with Administratrix—Trustee Act, 1893 (56 *&* 57 *Vict. c.* 53), *s.* 25, *sub-ss.* 1, 3.

An administrator who has paid all expenses and debts and cleared the intestate's estate stands in the same position towards the next of kin as that which an executor who has cleared the estate stands in towards the residuary legatees; he ceases to be an administrator and becomes a trustee, and the Court can appoint a new trustee to act jointly with him.

M. W. PONDER died intestate on July 23, 1919, leaving him surviving Alice E. Ponder, his widow, and two children, Ronald M. Ponder, aged 10 years, and Anthony W. Ponder, aged 8 years. On August 23, 1919, the widow obtained letters of administration. As administratrix she realized all the intestate's personalty, and, after paying out of it the funeral expenses, debts and all duties and costs of the administration, and retaining her one-third, she invested the balance of the proceeds in her name. The shares of the two children in

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the residuary personalty, both capital and income, amounted respectively to 4922*l.* 11*s.* 9*d.* and 4955*l.* 0*s.* 7*d.*, both of which were invested in the plaintiff's name.

The intestate had also a freehold house. This was sold, and the proceeds of sale, after deducting the proper charges and expenses, amounted to the sum of 817*l.* 12*s.* 7*d.*, and this was invested by the widow, in her name as administratrix in 976*l.* 2*s.* 10*d.* War 5 per cent. stock 1929–47, and held by her in trust for R. M. Ponder, the intestate's heir-at-law, subject to the widow's dower interest therein.

The widow took out an originating summons under s. 25, sub-s. 1, of the Trustee Act, 1893, the infant children being joined as defendants, asking that the Public Trustee might be appointed as a trustee of the proceeds of sale of the realty, and of the shares of the children in the residuary personalty, jointly with the plaintiff.

There was evidence that the plaintiff had no business experience and was incapable of acting alone in the trusts, and the Public Trustee was willing to act as trustee but was doubtful whether he could accept the trusteeship, and desired that the question whether he could do so should be decided by the Court.

L. F. Potts for the plaintiff. The plaintiff, as administratrix, having paid all debts and expenses and cleared the estate, is functus officio, and is now a trustee: *In re Moore.* (1) There the testator left all his property to his wife and appointed her sole executrix, and he left legacies payable after her death, but did not constitute any person as trustee of his will, and it was held that, upon the retirement of the widow, the Court had jurisdiction under the Trustee Act, 1850, to appoint in her place a trustee or trustees to perform the duties incident to the office of an executor. There was, however, nothing in that Act corresponding to s. 25, sub-s. 3, of the Trustee Act, 1893, which provides that "nothing in this section shall give power to appoint an executor or administrator." Where an estate has been wound up, and the trust property in the hands

(1) (1882) 21 Ch. D. 778.

of an executor is freed from the administration of the estate, the office is changed from that of an executor to that of a trustee: *Eaton* v. *Daines* (1); *In re Willey.* (2)

There is no decision exactly in point as to an administrator, but his position as regards the next of kin must be the same as that of an executor as regards residuary legatees: see Lewin on Trusts, 12th ed., p. 843. Where an infant is interested in residue, and the estate has been cleared and the residue ascertained, whether there is an executor or an administrator, he holds the residue in trust for the infant within the meaning of s. 43 of the Conveyancing Act, 1881, and as a trustee is entitled to apply the income for the infant's maintenance as provided by that section: *In re Smith* (3); *In re Adams.* (4)

[He also referred to Williams on Executors, 11th ed., vol. ii., p. 1266, and *Cooper* v. *Cooper.* (5)]

J. H. Stamp for the infant defendants. It would be in the interest of the infants that the Public Trustee should be appointed. The decisions relied on by the plaintiff are doubted in Underhill on Trusts, 7th ed., p. 380.

SARGANT J. (after stating the facts). That the Court may appoint a new trustee to act with an executor where all the debts and the expenses of the estate have been paid, and the estate has been cleared, and the executor is left merely a trustee for the residuary legatees, seems quite clear. That is so, because when the estate has been wound up and the residue ascertained, the executor has ceased to be an executor and has become a trustee for the persons entitled to the residue. And I cannot see why the same reasoning should not apply to the case of the administratrix before me. The widow has divided the personalty into three portions for herself and her two infant sons, and from the time she did this she became a trustee of each of two of the shares for each son. A test is that either son could bring an action

(1) [1894] W. N. 32.
(2) (1890) W. N. 1.
(3) (1889) 42 Ch. D. 302.
(4) [1906] W. N. 220.
(5) (1874) L. R. 7 H. L. 53.

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against the widow in respect of his share without joining the other son.

The difficulty has arisen from the introduction into the Trustee Act, 1893, of sub-s. 3 of s. 25, and that provision was clearly inserted in view of the decision of Kay J. in *In re Moore* (1), which had been practically overruled by the Court of Appeal in *In re Willey.* (2) But *Eaton* v. *Daines* (3), a decision of Kekewich J., shows clearly that when an estate has been wound up, and the trust property is in the hands of an executor freed from the administration of the estate, the office is then changed from that of executor to that of a trustee, and therefore a power exists to appoint a trustee; and I see no reason why the same result should not follow in the case of an administratrix.

The question is whether, by virtue of the separation of the estate, so that each child has become entitled to a share, the result is that a person who was administratrix has not ceased to be administratrix and become a trustee of the share of each child. *In re Smith* (4) and *In re Adams* (5) show that, when the estate has been cleared and the residue ascertained, an executor or an administrator holds the residue in trust for an infant legatee within the meaning of s. 43 of the Conveyancing Act, 1881, and, on the footing that he has become a trustee, is entitled to apply the income for the infant's maintenance as provided by that section.

In the result, therefore, there must be an order appointing the Public Trustee, jointly with the widow, a trustee of each of the three separate funds—namely, the two funds of personal estate constituting the two shares of the infants in the personalty, and the fund consisting of the investments representing the proceeds of the sale of the real estate. The order should be prefaced by words similar to those in Seton on Judgments and Orders, 7th ed., p. 1174, which were used by Joyce J. in *In re Howard.* (6) The three funds should be identified by being set out in three schedules to the order, which will be

(1) 21 Ch. D. 778.
(2) (1890) W. N. 1.
(3) [1894] W. N. 32.
(4) 42 Ch. D. 302.
(5) [1906] W. N. 220.
(6) Nov. 4, 1909, A. 3813.

that, the Court being of opinion that the applicant has become and is a trustee (*a*) of the funds specified in Sch. 1 for the infant R. M. Ponder, (*b*) of the funds specified in Sch. 2 for the infant A. W. Ponder and (*c*) of the funds specified in Sch. 3 for the infant R. M. Ponder, as heir-at-law of the intestate, subject to the applicant's right of dower, appoint the Public Trustee to be trustee, jointly with the applicant, of the funds in Sch. 1; appoint the Public Trustee to be trustee, jointly with the applicant of the funds in Sch. 2; and appoint the Public Trustee to be trustee, jointly with the applicant, of the funds in Sch. 3—the costs of all parties, as between solicitor and client, to come out of the funds in Schs. 1 and 2 equally.

Solicitors: *Ford, Lloyd, Bartlett & Michelmore.*

F. E.

In re WALKER.

GOODWIN *v.* SCOTT.

[1921. W. 221.]

Will—Specific Gift of Investments—Residuary Gift—Testator afterwards of unsound Mind—Order in Lunacy for investment of Cash in Stock—Rights of Legatees—Ademption—Lunacy Act, 1890 (53 *Vict. c.* 5), *s.* 123, *sub-s.* 1.

Sect. 123, sub-s. 1, of the Lunacy Act, 1890, does not apply to the case of a bank balance of a testator which under an order in lunacy has been paid into Court and invested in stock.

By will dated in 1911, W. F. D. Walker gave to the defendant all his stock, shares or other investments, all his books and albums, his dressing-case, his naval telescope and his gold watch and chain, and to the plaintiff all the remainder of his property, including any balance he might have at his agents, Messrs. Woodhead and Co. (a branch of Messrs. Holt & Co.'s bank); and appointed the plaintiff executor. He died in 1920. In the interval his mind had become affected, and on January 15, 1919, an order in lunacy in the matter of the testator a person of unsound mind not so found by inquisition

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was made. At the date of the order a sum of 604*l.* 5*s.* 2*d.* was standing to the credit of the testator with Messrs. Holt & Co. (Woodhead's Branch). By the order it was ordered that on completing her security Mrs. E. I. Scott (the receiver) was authorized to receive and give a discharge for (with other moneys) 104*l.* 5*s.* 2*d.*, part of the 604*l.* 5*s.* 2*d.*, and it was directed that the 500*l.* balance be lodged in Court by the proper officer of Messrs. Holt & Co. and invested in India Stock. The whole net income of the testator's property was to be paid to the receiver for his maintenance. The 500*l.* was paid in and invested and at the death of the testator was represented by 714*l.* 4*s.* 3*d.* India 3½ per cent. stock.

The plaintiff took out a summons to determine whether the stock belonged to him as residuary legatee or to the defendant as specific legatee.

Vaisey for the plaintiff. This is the converse of the ordinary case of the conversion of land or stock into cash. The question is whether s. 123, sub-s. 1, of the Lunacy Act, 1890 (1), applies to the case of money being converted into stock. The plaintiff, according to the language of the will, may be regarded as a specific legatee of any balance of the testator at his bank. Unless s. 123 helps the plaintiff it is admitted he must fail. The 604*l.* 5*s.* 2*d.* standing to the credit of the testator at the bank at the time when the order in lunacy was made was a chose in action to which he was entitled—a debt due by the bank to him. The payment of the 500*l.* into Court pursuant to the order was a conversion of a chose in action into money. Thus, there were "moneys arising from a disposition" within the sub-section. The moneys can be followed into the investment. The plaintiff is, therefore, entitled to the stock. The sub-section means that nothing done in the administration of a

(1) Lunacy Act, 1890, s. 123: "(1.) The lunatic, his heirs, executors, administrators, next of kin, devisees, legatees, and assigns, shall have the same interest in any moneys arising from any sale, mortgage, or other disposition, under the powers of this Act which may not have been applied under such powers, as he or they would have had in the property the subject of the sale, mortgage, or disposition, if no sale, mortgage, or disposition had been made, and the surplus moneys shall be of the same nature as the property sold, mortgaged, or disposed of."

lunatic's estate shall effect an ademption or affect the rights of the original legatees: *In re Wood* (1), Heywood and Massey's Lunacy Practice, 5th ed., p. 259.

[*In re Larking* (2) and *In re Hodgson's Trusts* (3) were also mentioned.]

Underhill for the defendant. Sect. 123 does not apply. A residuary gift cannot be adeemed. The old law, which applies here, is stated by Chitty J. in *In re Freer*. (4) The defendant is entitled to the stock as if the testator had himself made the investment.

RUSSELL J. [after stating the facts and saying that the order of January 15, 1919, constituted an order on the bank to bring into Court 500*l*. out of the balance then standing to the credit of the testator.] At the testator's death there was not anything remaining of the balance at the bank, the 500*l*. having been invested and the rest paid to the receiver. So, if there were nothing else in the case, inasmuch as the will speaks from the death, the defendant would take the stock and the plaintiff any residuary estate. But it is said on behalf of the plaintiff that s. 123, sub-s. 1, of the Lunacy Act, 1890, applies so as to give him the stock. [His Lordship read the sub-section.] In my opinion this case is not covered by that section. It deals (so far as legatees are concerned) with cases in which specific property has in the administration of a lunatic's estate been converted into cash and part of that cash has been applied, leaving a balance. The section protects the legatee of a lunatic under any will which he may have made, in regard to any unapplied proceeds of the sale of property comprised in a specific bequest. If part of his estate has been converted in the course of the lunacy proceedings and there remain unapplied moneys part of the proceeds of conversion the specific legatee of the converted property is to have the unapplied balance. He is to have the same interest in the proceeds as he would have had in the property if no conversion had been made. The section does not in terms apply, and cannot, I think, by inference be applied, to a case like

(1) [1894] 2 Ch. 577.
(2) (1887) 37 Ch. D. 310.
(3) [1919] 2 Ch. 189.
(4) (1882) 22 Ch. D. 622, 627.

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the present—a conversion of cash into stock. The meaning of the section seems to me to be made clear by what is stated by Chitty J. in *In re Freer.* (1) There he says: "The general law upon the subject is clear. If the testator himself, not being a lunatic, had sold the stock and placed the proceeds to a separate account in his books, with a memorandum that for all purposes the proceeds were to stand in the place of the stock, the Wills Act would have stood in the way, and the memorandum would not have affected the rights of the parties inter se: and to my mind, all that has been done under the lunacy jurisdiction amounts to nothing more than what I have stated; for the law," i.e., apart from any statutory provision, "places the estate of the lunatic in the same position as if there had been no lunacy, except for the 119th section of the Lunacy Regulation Act, 1853, which provides that the proceeds of land shall, notwithstanding its conversion, preserve the character of land, and belong to the same persons who would have been entitled to the land if there had been no conversion." In 1882, when Chitty J. was speaking, the only existing statutory provision was s. 119 of the Lunacy Regulation Act, 1853, which dealt only with the conversion of land. Subsequently the Lunacy Act, 1890, was passed and by s. 123 extended the protection already given in regard to land to all classes of property. With the exception of those statutory provisions—the object of which was to protect specific gifts and to prevent ademption of them—the old law still prevails. Apart from questions of double portions, there can be no ademption of a residuary gift. I make a declaration that in the events which have happened, the 714*l.* 4*s.* 3*d.* stock belongs to the defendant as legatee of the testator's stock, shares and other investments.

Solicitors: *Hyman Isaacs, Lewis & Mills, for C. Burt Brill, Brighton; Greene & Underhill.*

(1) 22 Ch. D. 627.

A. L.

STOECK *v.* PUBLIC TRUSTEE.

RUSSELL J.

1921

April 14, 19, 28.

[1920. S. 2539.]

War—German National—Treaty of Peace, Part X., s. IV.*—Treaty of Peace Order,* 1919.

The Treaty of Peace Order, 1919, and ss. III. to VII. of Part X. of the Treaty of Peace with Germany form part of the municipal law of this country.

Plaintiff having lost Prussian nationality in 1896 and not acquired nationality of a German state or other nationality:—

Held, not a German national within the meaning of s. IV. of Part X. of the Treaty of Peace or the Treaty of Peace Order, 1919.

Statelessness is recognized by German municipal law.

It is not unrecognized by the municipal law of this country. Dictum of Phillimore L.J. in *Ex parte Weber* [1916] 1 K. B. 283 questioned.

Whether it is recognized in international law, quaere.

Ex parte Weber [1916] 1 A. C. 421 and *In re Liebmann* [1916] 1 K. B. 268 distinguished.

THE facts, which appear from the headnote, are, with the evidence and material statutory provisions, set out in the judgment.

Romer K.C., *B. A. Cohen K.C.* and *W. Frampton* for the plaintiff. The plaintiff, when he lost his Prussian or state nationality, thereby lost his federal or German nationality. He is of no nationality, a position well recognized by writers on international law: Westlake's International Law, 2nd ed. (1910), vol. i., p. 224; Oppenheim's International Law, 2nd ed., vol. i., §§ 293, 297, 302, 311. There is no difference between the definition of "nationals" in s. 2 of the Treaty of Peace Order, 1919, and the meaning which the word always bears in international law. It is for the municipal law of each country, here of Germany, to decide whether a particular individual is its national or not: Hall's International Law, 7th ed., p. 233, § 66, p. 256, § 74. English statutes recognize that a person may be stateless: Naturalization Act, 1870, s. 4; British Nationality and Status of Aliens Act, 1914, s. 14. In the London Gazette of April 9, 1920, a list of persons naturalized is published, among whom is included one "of no nationality."

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If it is a question of international law decisions of any country are admissible as authorities; there have been two cases in the Belgian Courts.

[They referred to Treaty of Peace with Germany, Part X., s. IV., art. 297, paras. *b*, *c*, *h*, *i*, and Annex, para. 4; Treaty of Peace Order, 1919, s. 1, sub-ss. XVI., XVII. and s. 2; *Ex parte Liebmann* (1); *Ex parte Weber* (2); *Schaffenius* v. *Goldberg*. (3)]

Sir Ernest Pollock S.-G. and *Gavin Simonds* for the defendants. If the Court has jurisdiction to interpret the Treaty of Peace at all, it may in its discretion wisely decline to do so. It is one thing to decide what the Treaty of Peace Order means; it is another to decide what the Treaty means; that is an international document and a matter to be dealt with at some time or other by the high contracting parties not excluding Germany. It is not a question of the municipal law of a particular country.

The definition of "nationals" in the Peace Order, s. 2, which is curiously drawn, is put in simply to include companies; the expression might otherwise seem to mean living persons; beyond that, the section does not assist. A simple scheme of interpretation, though there are difficulties in it, is that all persons who will be compensated by Germany and all other persons are correlative terms. The meaning of the Order cannot be restricted by the narrowness of German law. It is not to be supposed that the British Empire has agreed to pay everybody except those whom, as being German nationals in the narrow sense of German law, Germany has agreed to compensate. The Court ought not to declare that the plaintiff is not a German national within the Order. It ought not to make a declaration which will enable property to be handed back to him and give Germany an advantage in having money paid out of this country to a person residing, not in this country, but in Germany. The question of where the plaintiff now resides is a matter to be taken into consideration. According

(1) [1916] 1 K. B. 268. 1 A. C. 421.
(2) [1916] 1 K. B. 280*n.*; [1916] (3) [1916] 1 K. B. 284, 301.

to English law the plaintiff is to be regarded as a German national, and in that sense he is to be so regarded in the Order. If English law does not admit of a condition of statelessness then, inasmuch as he is not an English national, he must be a German national. There is no direct authority, apart from what Phillimore L.J. says in *In re Weber* (1), that English municipal law does not recognize a condition of statelessness. But on principle that is so. A person must be a citizen or an alien. On grounds of public policy it is very desirable that this country should not have in its midst any one of whom it cannot be predicated whether he belongs to a friendly, a neutral or an enemy state. Though German law may say that a person is a German national, English municipal law may say that for the purpose of our law he is not to be so regarded, and vice versa. Russian law may say that an illegitimate child born in Russia of an English mother is British; but by English law he is not: Hall's International Law, 7th ed., § 74. When Roumania some years ago denationalized her Jewish citizens, it did not involve that English municipal law must recognize that a denationalized Roumanian Jew was not a Roumanian national. No common law authority is to be found that a person must have some nationality. The war emergency legislation proceeded on the footing that he must: British Nationality and Status of Aliens Act, 1918, s. 1; Aliens Restriction (Amendment) Act, 1919, s. 2. This country may deem a person to be a subject of a state though in fact by the municipal law of that state he is not. The opinion of international jurists is in a state of fluidity on the question of no nationality.

[They also referred to *In re Münster* (2) (on the 2722*l.* 11*s.* 6*d.*); British Nationality and Status of Aliens Act, 1918, s. 1; Aliens Restriction (Amendment) Act, 1919, ss. 2, 15; *Porter* v. *Freudenberg* (3); Holtzendorff, Handbuch des Völkerrechts.]

Romer K.C. in reply. Art. 297 of the Treaty of Peace has,

(1) [1916] 1 K. B. 283. (2) [1920] 1 Ch. 268.
(3) [1915] 1 K. B. 857.

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by virtue of s. 1 of the Peace Order, become part of the municipal law of England. That is the only reason why the construction of the Treaty has been brought in for consideration. The question whether a person is a German national must, and can only, be determined by the fact of German law. There is nothing in the new s. 7*a*, sub-s. 3, of the British Nationality and Status of Aliens Act, 1914, to suggest that English law recognizes that a person must have some nationality. Inasmuch as nationality according to our municipal law depends in some cases on descent and in others on birth and the law as to descent of personal estate on domicil, the question of no nationality would very seldom be likely to arise. Sect. 15 of the Aliens Restriction (Amendment) Act, 1919, recognizes statelessness in our municipal law. There is no difficulty in the objection of the defendants that it might be inconvenient for a state to have a large number of stateless persons within its borders. Oppenheim in his International Law, vol. i, § 313, answers that objection.

Cur. adv. vult.

April 28. RUSSELL J. The plaintiff sues the Public Trustee and the Attorney-General for a declaration that he was not on January 10, 1920 (the date when the Treaty of Peace with Germany came into force), and is not, a German national within the meaning of the Treaty of Peace Order, 1919, or the Treaty of Peace ; and he also asks for other relief. The object of his action is to ascertain whether certain property in this country—namely, (i.) a sum of 2722*l.* 11*s.* 6*d.*; (ii.) a balance at the bank of 172*l.* 9*s.* 4*d.* ; and (iii.) some furniture in store—are subject to the charge created by s. 1, sub-s. XVI., of the Treaty of Peace Order, and whether he can deal with such property without incurring the pains and penalties prescribed by sub-s. XVII. of the same section. The Treaty of Peace Order provides that ss. III., IV., V., VI. and VII. of Part X. of the Treaty of Peace shall have full force and effect as law. By virtue of the Treaty of Peace Act, 1919, the Treaty of Peace Order has effect as if enacted in that Act.

In the result, therefore, the Treaty of Peace Order and the above-mentioned sections of the Treaty of Peace form part of the municipal law of this country. I mention this at the outset, because a suggestion was made by the Solicitor-General that the Court should be reluctant to construe, and indeed should in the exercise of some discretion refrain from construing, an international document such as the Treaty of Peace, executed between high contracting parties and capable of alteration or interpretation at their hands. I do not appreciate this contention. I apprehend it is the right of a litigant to assert before the Courts of this country, and the duty of those Courts to adjudicate upon, claims founded upon a consideration of the municipal law of this country, and not the less so because the law involved has been derived from, and has been enacted for the purpose of giving effect to, certain provisions of a document of an international character.

The relevant personal history of the plaintiff is as follows: He was born in 1872 at Kreuznach in Rhenish Prussia. In October, 1895, he left Prussia and went to reside in Belgium. On June 26, 1896, he obtained his discharge from Prussian nationality. He never subsequently applied for, or obtained, the nationality of any German state. In November, 1896, he came to England, and made this country his permanent home. He was never naturalized here. In May, 1916, he was interned. In 1918 he was deported to Holland; thence he went to Germany and has resided there ever since. He was the owner of 3600 shares in a limited company, and in regard to those shares the Board of Trade proposed in 1916 to make a vesting order. He objected on the ground that he was not an enemy subject within the Trading with the Enemy Amendment Act, 1916. The matter was compromised by an agreement under which the shares were to be transferred to the Public Trustee as trustee for him; they were to be sold and the proceeds paid to his banking account in London. They were sold, but before the proceeds (2722*l.* 11*s.* 6*d.*) had been paid to the bank he had been sent to Holland and had gone to live in Germany. He thereby became an enemy within the Trading with the Enemy Amendment Act, 1916, and

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accordingly an order was made, and properly made, under that Act by the Board of Trade vesting the proceeds of sale in the Public Trustee as custodian. So far as this sum of 2722*l.* 11*s.* 6*d.* is concerned this action must fail, because (as was conceded at the trial) that sum is now held by the custodian subject, and subject only, to the provisions of s. 5, sub-s. 1, of the Trading with the Enemy Amendment Act, 1914. There remain, however, the bank balance and the furniture which are the plaintiff's property, subject or not (as the case may be) to the charge created by the Treaty of Peace Order.

I will now consider the material provisions of the Treaty of Peace and the Treaty of Peace Order. By Part X., s. IV., art. 297, para. *b*, of the Treaty of Peace, the Allied and Associated Powers reserve the right to retain and liquidate all property belonging at the date of the coming into force of the Treaty to German nationals within their territories. By para. *h*, sub-para. 1, the net proceeds of sales of enemy property, and in general all cash assets of enemies, are (as regards Powers adopting s. III. and the Annex thereto) to be credited to the Power of which the owner is a national, through the clearing office established thereunder; any credit balance in favour of Germany resulting therefrom being reckoned as a credit to Germany in respect of her reparation obligations (art. 243 (*a*)). By para. *i* Germany undertakes to compensate her nationals in respect of the sale or retention of their property in Allied or Associated States. By clause 4 of the Annex to s. IV. it is provided that the property of German nationals within the territory of any Allied or Associated Power and the net proceeds of their sale may be charged by that Power with payment (amongst other things) of amounts due in respect of claims by the nationals of that Power.

By the Treaty of Peace Order, ss. III. to VII. of Part X. of the Treaty of Peace are given full force and effect as law, and the clearing office in the United Kingdom is established. The charge authorized and contemplated by the Treaty of Peace is created and made effective by (amongst

others) the following provisions of the Treaty of Peace Order: Sect. 1, sub-s. XVI.: "All property, rights and interests within His Majesty's Dominions or Protectorates belonging to German nationals at the date when the Treaty comes into force (not being property, rights or interests acquired under any general licence issued by or on behalf of His Majesty), and the net proceeds of their sale, liquidation or other dealings therewith, are hereby charged—(*a*) in the first place, with payment of the amounts due in respect of claims by British nationals with regard to their property, rights and interests, including companies and associations in which they are interested in German territory, or debts owing to them by German nationals, and with payment of any compensation awarded by the Mixed Arbitral Tribunal, or by an arbitrator appointed by that Tribunal in pursuance of para. (*e*) of art. 297, and with payment of claims growing out of acts committed by the German Government or by German authorities since the thirty-first day of July, and before the fourth day of August, nineteen hundred and fourteen; and (*b*) secondly, with payment of the amounts due in respect of claims by British nationals with regard to their property, rights and interests in the territories of Austria-Hungary, Bulgaria and Turkey, in so far as those claims are not otherwise satisfied. Provided that any particular property, rights or interests so charged may at any time, if His Majesty thinks fit, be released from the charge so created." Sub-s. XVII.: "With a view to making effective and enforcing such charge as aforesaid—(*a*) no person shall, without the consent of the custodian, transfer, part with or otherwise deal in any property, right or interest subject to the charge, and if he does so he shall be liable on summary conviction to a fine not exceeding one hundred pounds or to imprisonment for a term not exceeding three months or to both such imprisonment and fine."

The relevant question affecting the plaintiff is this: Is his property here property belonging to a German national and, therefore, property which is charged by the Treaty of Peace Order, and which he may not deal with except with the consent of the custodian or at the risk of fine and imprisonment?

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In other words, was the plaintiff on January 10, 1920, a German national?

The plaintiff alleges and contends, first, that he has ever since 1896 been completely divested of Prussian nationality and German nationality; secondly, that he has never acquired any other nationality; thirdly, that he is in the condition of a stateless person; fourthly, that he was not on January 10, 1920, a German national; and, fifthly, that his property here is, therefore, not subject to the charge created by the Treaty of Peace Order. The defendant alleges and contends, first, that notwithstanding the plaintiff's discharge in 1896, he either retained some remnant or shred of Prussian or German nationality, or had not lost such nationality for all purposes; secondly, that the condition of a stateless person is one not recognized by law, international or municipal; thirdly, that the words "German national" in the Treaty of Peace, and incorporated therefrom into the Treaty of Peace Order, mean or include a German national according to English law; fourthly, that, English law not recognizing the condition of a stateless person, the plaintiff would be a German national according to English law; fifthly, that he was such a German national on January 10, 1920; and sixthly, that his property here is, therefore, subject to the charge created by the Treaty of Peace Order.

I was referred to two authorities: *Ex parte Weber* (1) and *Ex parte Liebmann.* (2) In each of those cases the person in question, who had apparently been interned as an alien enemy in exercise of the Crown's prerogative, claimed not to be an alien enemy by reason of the fact that he had lost his German nationality; and he applied for a rule nisi for a writ of habeas corpus. In *Weber's Case* (3) the Court of Appeal (on appeal from the Divisional Court) refused the rule on the ground that the applicant had failed to satisfy the Court that he had lost his German nationality for all purposes, and that he had consequently failed to establish that he was not an alien enemy. This decision was affirmed by the House

(1) [1916] 1 K. B. 280*n.*; [1916] 1 A. C. 421.

(2) [1916] 1 K. B. 268.

(3) [1916] 1 K. B. 280*n.*

of Lords on the same grounds. The loss of nationality was alleged to have occurred (*a*) by reason of continuous residence out of Germany for ten years under ss. 13 and 21 of a statute of 1870 or (*b*) under s. 26 of a statute of 1913. The Court of Appeal came to the conclusion that the applicant had failed to prove loss of German nationality for all purposes for two reasons. The first was, because a person losing nationality under s. 26 of the statute of 1913 has a right in certain circumstances on returning to Germany to naturalization. Sect. 26 has, however, no application to the present plaintiff. The second reason was that in certain cases a person who has lost his German nationality by ten years' absence, even if he has acquired a foreign domicil, may without returning to Germany recover his German nationality. This may be a reference to s. 21 of the Act of 1870. If it is, I would point out that that section has no application to the present plaintiff. If it is a reference to s. 13 of the Act of 1913, the privilege there given to a former German is equally given to persons who never were Germans. This operation of s. 13 was proved by proper evidence before me. I do not know what translation of s. 13 was before the Court of Appeal. It may have been, and very probably was, an official paper presented to both Houses of Parliament by command of His Majesty in March, 1914. That paper contains a translation of the law of 1913 and a memorandum therein by His Majesty's Embassy at Berlin; but it contains a mistranslation of s. 13. That section (and this is also true of s. 33) applies not to the "child" of a former German, as stated in the official paper, but to any descendant, "wer von einem solchen abstammt." The result of this is to establish that whatever privileges are conferred by those sections are equally conferred upon former Germans and upon persons who never possessed German nationality at all. The House of Lords decided *Weber's Case* (1) on substantially the same grounds as the Court of Appeal; but, in addition, great stress was laid upon the fact that as a former German, if he returned to Germany, he would be liable to serve in the German Army by virtue of the Military Act of 1874. It was proved

(1) [1916] 1 A. C. 421.

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before me by proper evidence that in point of fact that Act had been repealed and replaced by an Act of 1913 which imposed that obligation upon all "stateless persons"—namely, persons residing in Germany "die keinem Staate angehören." It would appear, therefore, that none of the elements upon which reliance was placed by those who decided the case of *Ex parte Weber* (1) exist in the case of the present plaintiff. *Ex parte Liebmann* (2) carries the matter no further upon the point material here. It merely followed *Ex parte Weber.* (1)

The question for me to decide in this connection is whether the plaintiff on the evidence before me has satisfied me that he has lost his German nationality for all purposes. Two German lawyers were called before me, Dr. Goldschmidt and Dr. Baerwald; and I will now read their evidence upon this point. No evidence was called by the defendants. Dr. Goldschmidt said, "I am familiar with German law. I have seen a copy of the plaintiff's discharge of June 26, 1896. By this document Stoeck has absolutely lost his German nationality. He is discharged from his Prussian nationality and thereby he loses his imperial nationality. According to German law, having lost his German nationality and not having acquired any other, he would be regarded as stateless. On the handing out of the document of discharge Stoeck lost his German nationality for all purposes. He would then owe no duty or obligation to the German government or the German nation. I now produce the text of the Military Law of 1913. Sect. 1 (which amends the old s. 11) provides that persons who belong to no state but reside in Germany or in a protectorate may be called on for military service in the same way as Germans. I know of no right which persons formerly of German nationality possess; I know of no privilege which they possess except those conferred by ss. 13 and 33 of the Act of 1913. Those privileges apply both to former Germans who have acquired a fresh nationality and to those who have not. They apply also to descendants of a former German. The German word is 'abstammen,' that is, a descendant; child is 'kind.'

(1) [1916] 1 K. B. 280*n.*; [1916] 1 A. C. 421.
(2) [1916] 1 K. B. 268.

There is no foundation in German law for the suggestion that a former German retains any German nationality or retains it for any purpose. Stoeck is not a German national for any purpose according to German law"; and that evidence is corroborated by Dr. Baerwald.

This evidence satisfies me that the plaintiff has lost his German nationality for all purposes. It is not suggested that he has acquired any other nationality. If then such a condition is possible in law the plaintiff is a person of no nationality; he is a stateless person. Is such a condition possible in law? So far as international law is concerned, opinions appear to differ. Hall in his treatise on International Law, 7th ed., p. 256, deals with the matter as follows: "§ 74. In a certain number of cases it is possible for persons to be destitute of any national character. In Austria, for example, anyone emigrating without permission of the state loses his nationality by the act of emigrating, and is consequently without nationality until or unless he is formally received into another state community; in the Argentine Confederation, a foreign woman does not acquire the nationality of her husband on marrying an Argentine citizen, although she may have lost her nationality of origin by marrying a subject of another state; and the illegitimate son of an Englishwoman born in Russia, though British in the eye of Russian law, is of no nationality elsewhere, since by English law he is not British, and by Russian law he is not Russian. It is evident that the existence of numerous persons in like condition would be embarrassing; and it appears that much inconvenience was in fact caused until lately both in Germany and Switzerland by the presence of individuals who either had no nationality, or whose nationality it was impossible to determine. It was ultimately settled by convention as between the Swiss Cantons and as between German States that anyone found to be in either of these positions should be considered to be a subject of the state in which he was living." Oppenheim in his International Law, 2nd ed., vol. i., pp. 387–9, devotes a portion of Ch. 3 in Pt. 2 to the subject of "Double and Absent Nationality." He says: "§ 311. An individual may be

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destitute of nationality knowingly or unknowingly, intentionally or through no fault of his own. Even by birth a person may be stateless. Thus, an illegitimate child born in Germany of an English mother is actually destitute of nationality because according to German law he does not acquire German nationality, and according to British law he does not acquire British nationality. Thus, further, all children born in Germany of parents who are destitute of nationality are themselves, according to German law, stateless. But statelessness may take place after birth. All individuals who have lost their original nationality without having acquired another are in fact destitute of nationality." And, again, he states: "§ 313. Double as well as absent nationality of individuals has from time to time created many difficulties for the States concerned. As regards the remedy for such difficulties, it is comparatively easy to meet those created by absent nationality. If the number of stateless individuals increases much within a certain State, the latter can require them to apply for naturalisation or to leave the country; it can even naturalise them by Municipal Law against their will, as no other State will, or has a right to, interfere, and as, further, the very fact of the existence of individuals destitute of nationality is a blemish in Municipal as well as in International Law." Holtzendorff on the other hand takes a different view. After all the question of what state a person belongs to must ultimately be decided by the municipal law of the state to which he claims to belong or to which it is alleged that he belongs; and, if no state exists according to the municipal law of which a given individual is its national, it is difficult to see to what state he can belong, how he can be other than a stateless person, or why an international lawyer or any one else should close his eyes to such a possibility.

How does the matter stand as regards German municipal law? It is clear on the evidence before me that German municipal law recognizes the condition of a stateless person. Sect. 1 of the Military Law of 1913 (in substituting a new s. 11 under the old law) specifically imposes the burden of military service on stateless persons who reside in Germany

or a protectorate. A treaty between Germany and Denmark was referred to where the expression "staatenlos" appears. In Germany stateless persons must give security for costs in litigation because no country signed on their behalf a certain Hague Convention of 1896. The position of a stateless person is recognized in art. 29 of the German Introductory Statute, 1896. Finally the plaintiff produced an official paper of identity relating to himself and issued by the German police, in which he is described as "staatenlos" or "stateless."

How does the matter stand in regard to English municipal law? No authority dealing with the matter was produced to me, beyond the following passage in the judgment of Phillimore L.J. in *Ex parte Weber* (1): "I have not been able to find nor have we been furnished with any decision as to the case of a man who says that he is of no nationality. Modern national legislation has allowed persons to procure nationality in countries which are not the countries of their nationality of origin; but it is going a step further to say that any country has recognized that a man can shake off his position as a national of the country in which he was born without acquiring the duties and responsibilities of a national of some other country. This applicant might long ago have procured nationalization in this country. He has not done so, and, as at present advised, I think that he must be taken, as far as this country is concerned, to be still retaining his nationality of origin." It will be observed that Phillimore L.J. gives no authority for his statement. In the House of Lords the point was specifically kept open. I lay no stress on the fact that an official publication like the London Gazette describes persons as of no nationality; but s. 4 of the Naturalization Act, 1870, and s. 14 of the British Nationality and Status of Aliens Act, 1914, deserve attention. The latter Act repeals the former, and s. 4 of the 1870 Act is replaced by s. 14 of the 1914 Act. It is only necessary to refer to the latter section. It is in the following terms: "(1.) Any person who by reason of his having been born within His Majesty's dominions and allegiance or on board a British

(1) [1916] 1 K. B. 283.

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ship is a natural-born British subject, but who at his birth or during his minority became under the law of any foreign state a subject also of that state, and is still such a subject, may, if of full age and not under disability, make a declaration of alienage, and on making the declaration shall cease to be a British subject." Sub-s. 2 provides: "Any person who though born out of His Majesty's dominions is a natural-born British subject may, if of full age and not under disability, make a declaration of alienage, and on making the declaration shall cease to be a British subject." It will be seen that sub-s. 1 only enables a person of the class mentioned to cease to be a British subject, who at the time of cesser is a subject of some foreign state. On the other hand under sub-s. 2, a person of the class there mentioned can cease to be a British subject even though at the time of cesser he is not a subject of some foreign state. Thus the son born in Germany of a British subject who was born in England is certainly not a German by German law. He is by English law a natural-born British subject. He may on attaining twenty-one (even though he is not a subject of any foreign state) cease to be a British subject. He will thereby no doubt become an alien. He will not thereby become a German. I confess I cannot see what he is, if he is not stateless. Take again the case of an illegitimate child born in Germany of an English mother. The child by German law is not of German nationality, and by English law is not of English nationality. The child must, it seems to me, be stateless. Reference was made by the defendants to s. 1 of the British Nationality and Status of Aliens Act, 1918, which substitutes new ss. 7 and 7*a* for s. 7 of the Act of 1914. By the new s. 7*a*, sub-s. 3, it is provided that "where a certificate of naturalization is revoked the former holder thereof shall be regarded as an alien and as a subject of the state to which he belonged at the time the certificate was granted." It was argued that that presupposed that every one must have a state to which he belongs; I do not agree. The provision is not inconsistent with the idea of "statelessness," and is only applicable if the grantee of the

certificate was at the date of the grant a subject of another state. If he were not such a subject, the effect of the revocation would be merely to cause him to be regarded as an alien. Reliance was also placed on s. 2, sub-s. 1, of the Aliens Restriction (Amendment) Act, 1919, as showing that the statute recognizes the advisability of ascribing nationality to aliens whose nationality may be in doubt. This may well be so more particularly where the object of the legislation is to enable restrictions to be imposed on aliens; but the sub-section does not appear to throw any light upon the point under consideration. The Act, however, does afford another instance in which the statute law of this country appears to entertain the possibility of a person being stateless. Sect. 1, sub-s. 2, empowers His Majesty by order in council to make regulations requiring information to be given as to the property of "former aliens" and this with a view to enforce the provisions of any Treaty of Peace concluded or to be concluded with any Power with which His Majesty was at war in the year 1918. The date of the Act is December 23, 1919. The Treaty of Peace with Germany had then been signed, although neither it nor the Treaty of Peace Order had come into force. Sect. 15 of the Act defines the expression "former enemy alien," and in that definition are included both (*a*) a person who *is* a subject or citizen of the German Empire or any component state thereof, or of Austria, Hungary, Bulgaria or Turkey; and (*b*) a person who (having at any time been such subject or citizen) has not changed his allegiance as therein mentioned or been naturalized in any other foreign state or in any British Possession as therein mentioned, *and* does not retain according to the law of his state of origin the nationality of that state. The definition appears to contemplate, or at all events it will include, the case of a denationalized German who has not acquired any other nationality. The dearth of direct authority in English law upon this point is not to be wondered at. In truth the question of statelessness can have seldom arisen as an important or practical question. The division into subjects and aliens is clear and sufficient for the ordinary purposes of the common

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law; and the stateless person would be one of the aliens. But the present case has raised the question, and, upon consideration of the arguments addressed to me and the statutory enactments before referred to, I hold that the condition of a stateless person is not a condition unrecognized by the municipal law of this country.

There remains for consideration the contention that the words "German national" in the Treaty of Peace Order, and s. IV. of Part X. of the Treaty of Peace, mean or include a German national according to English law. I confess I have difficulty in following this. Whether a person is a national of a country must be determined by the municipal law of that country. Upon this I think all text writers are agreed. It would be strange were it otherwise. How could the municipal law of England determine that a person *is* a national of Germany? It might determine that for the purposes of English municipal law a person shall be deemed to be a national of Germany, or shall be treated as if he were a national of Germany; but that would not constitute him a national of Germany, if he were not such according to the municipal law of Germany. In truth there is not and cannot be such an individual as a German national according to English law; and there could be no justification for interpreting or expanding the words "German national" in the manner suggested.

In the result the plaintiff is entitled to the following declaration which I make accordingly: Declare that the plaintiff was not on January 10, 1920, a German national within the meaning of the Treaty of Peace Order, 1919, or within the meaning of s. IV. of Part X. of the Treaty of Peace therein mentioned which is set out in the Schedule thereto, and as to which it is thereby ordered that it shall have full force and effect as law.

Solicitors: *Cruesemann & Rouse; Solicitor to the Board of Trade.*

A. L.

SUN PERMANENT BENEFIT BUILDING SOCIETY
v.
WESTERN SUBURBAN AND HARROW ROAD PERMANENT BUILDING SOCIETY.

P. O LAWRENCE J.

1921

Jan. 17, 18, 21; *Feb.* 17; *March* 2.

[1919. S. 1882.]

Vendor and Purchaser—Building Society—Mortgages of Members—Contract to sell Mortgages to another Building Society—Directors acting honestly—Ultra vires—Fines—Specific Performance.

A building society is not a trustee of its funds for its members, and its directors are not fettered by the rules applicable to ordinary trustees as to the nature of the securities which they may invest upon, but have a large discretion as to the time when and the circumstances under which they ought to invest the funds of the society: mere imprudence or want of judgment as to the time of investment, and as to the funds available for investment, cannot be said to amount to gross negligence. Where therefore the directors of a building society, acting honestly, entered into a contract to purchase the mortgage securities of another building society which was in liquidation, and the vendors, having no knowledge or notice of any irregularities on the part of the directors of the purchasing society, brought an action to enforce specific performance of the contract:—

Held, that the objection that the transaction, if it proved unprofitable, might involve the directors of the defendant society in an action for damages for misfeasance or breach of trust in respect of their statutory duties, was no ground for refusing the plaintiff specific performance of the contract, even if the directors had committed some breach of duty in entering into it.

The principle of *Sheffield and South Yorkshire Permanent Building Society* v. *Aizlewood* (1889) 44 Ch. D. 412 and *Eastern Counties Ry. Co.* v. *Hawkes* (1855) 5 H. L. C. 331 applied.

Held, also, that if the result of the transfer of the plaintiff's mortgage securities to the defendant society was that the obligation on the mortgagors to pay fines became no longer operative, such a result was not a sufficient ground for refusing specific performance of the contract.

WITNESS ACTION.

The plaintiff and defendant societies were respectively registered under the Building Societies Act, 1874, and in March, 1919, the plaintiff society went into voluntary liquidation. The action raised the question whether a contract for the sale of the mortgage securities of the plaintiff society to the defendant society could be specifically enforced.

P. O. LAWRENCE J.

1921

SUN BUILDING SOCIETY v. WESTERN SUBURBAN BUILDING SOCIETY.

The following statement of facts is taken substantially from the judgment.

In April, 1919, C. W. Durnford, the chairman of the directors of the defendant society, was asked by H. R. Frost, the secretary of the plaintiff society, whether the defendant society would purchase the mortgage securities of the plaintiff society, and Durnford requested Frost to furnish particulars of the securities and said he would consider the matter. On April 30, 1919, Frost sent particulars of the securities to Durnford, who examined them and came to the conclusion that the transaction was one which would be suitable for the defendant society to undertake and that it would be a means of increasing the membership of the defendant society. The latter conclusion was admitted at the trial to be erroneous, but the mistake was not discovered by Durnford until after the contract was made, and there was no evidence that this erroneous conclusion was communicated by Durnford to his co-directors. On May 5, 1919, Durnford submitted the plaintiff society's proposal to sell the securities to his co-directors at a board meeting. After the transaction had been fully explained by Durnford and fully discussed by the directors present at the meeting it was resolved "that the proposal be entertained and with a view to arriving at a settlement of the amount at which the mortgages could be taken over the chairman was instructed to thoroughly investigate the matter and to obtain every possible information and to report to the directors at the next board meeting to be held on Friday, the 16th May, 1919, at 6.30 P.M." In pursuance of the instructions given to him at this board meeting Durnford had an interview with Frost at the office of the plaintiff society on the 6th or 7th of May, 1919, and carefully investigated the matter and inspected the mortgage ledgers which he found to be in order, and from which it appeared that there were thirty-seven mortgages, that the principal money owing upon them was 6893*l.* 19*s.* 10*d.*, that the prospective interest amounted to 2230*l.* 7*s.* 2*d.*, and the repayments on the whole seemed to have been regularly made.

At a board meeting of the defendant society held on May 16,

1919, Durnford reported the result of his investigations to his co-directors, and after discussion it was resolved "That the chairman be and is hereby authorized to negotiate with the liquidators of the Sun Permanent Benefit Building Society for the purchase of the mortgages as set out in the schedule of properties submitted to this meeting amounting in the aggregate to 6893*l.* 19*s.* 10*d.* principal for the sum of 6000*l.*, with power to increase the offer up to 6250*l.* subject to the following conditions—all expenses in connection with the transfer to be paid by the vendor society and all securities to be handed over together with the solicitor and surveyor's reports and advance ledgers, the deed transferring these mortgages to this society to be approved by our solicitor." It was also resolved "that a cheque for a deposit of 10 per cent. on the amount be signed if necessary." In accordance with this resolution Durnford endeavoured to get the liquidators of the plaintiff society to accept 6000*l.* for the mortgages. They declined to do so, but intimated their willingness to accept 6480*l.* At a board meeting held on May 23, 1919, Durnford reported the result of his further negotiations with the liquidators of the plaintiff society, and after discussion it was resolved "That if the chairman is unable to obtain any deduction he be authorized to accept the offer to transfer the mortgages for 6480*l.* on the same conditions as embodied in our previous offer." In accordance with this resolution Durnford again approached the liquidators of the plaintiff society, and in the result the contract of May 28, 1919, was entered into whereby the defendant society agreed to purchase and the plaintiff society agreed to sell the thirty-seven mortgages for the sum of 6400*l.* 12*s.* 1*d.*, the plaintiff society agreeing to pay all expenses in connection with the transfer except the defendant society's own solicitor's charges, and completion being fixed to take place on June 14, 1919.

The plaintiff society used a printed form of mortgage in making advances to its members by which the member, designated "the mortgagor," conveyed his property to the society, its successors and assigns subject to redemption if the mortgagor should make the several payments thereinafter

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covenanted by him to be made in manner thereinafter mentioned and should in all other respects duly keep and observe all the rules of the society for the time being so far as the same were applicable and all the covenants on his part thereinafter contained. And the mortgagor covenanted (inter alia) to pay the society or the officers or agents duly authorized to receive the same the sum specified in the schedule thereto to be payable by the mortgagor in respect of the advance (being a sum consisting of principal and interest combined) by such instalments and at such times as were specified in the same schedule and to duly and punctually pay unto the society all subscriptions, fines, fees and other payments whatsoever which under the rules and regulations for the time being of the society should from time to time become due or payable by the mortgagor in respect of the said advance or the interest thereon. And it was thereby declared that the expression "mortgagor" should in all cases where such an interpretation was not inconsistent with the context be construed to include the heirs, executors, administrators and assigns of the mortgagor, and that the expression "the society" should extend to and include the successors and assigns of the society where the context should require or admit thereof.

Up to the date of the contract the directors of the defendant society had been acting without any legal advice, but shortly afterwards they consulted their solicitors and counsel. In pursuance of the legal advice they then received Durnford on behalf of the defendant society on July 8, 1919, wrote to Frost as secretary of the plaintiff society stating that the defendant society had been advised that it was doubtful whether the liquidators of the plaintiff society had any power to sell the mortgage securities without first obtaining a supervision order and asking whether the plaintiff society was prepared to obtain such an order, "for unless they do so, I am afraid it will not be possible to carry the matter through." This letter also suggested that it might be necessary to obtain the concurrence of all the mortgagors to the transfer of their mortgages. On August 12, 1919, the plaintiff society definitely declined to apply to the Court for a supervision order

or to obtain the concurrence of the mortgagors to the transfer of the mortgages, and threatened proceedings for specific performance unless the defendant society should on or before August 20, 1919, intimate their willingness to complete the purchase. The defendant society did not give the required intimation, and thereupon the plaintiff society issued the writ in this action on August 28, 1919, claiming specific performance of the contract of May 28, 1919.

After pleadings were delivered the parties by agreement stated a Special Case for the opinion of the Court on three preliminary points—namely, (1.) whether the contract was ultra vires the defendant society; and, if so, whether it was capable of being enforced by the plaintiffs against the defendant society, (2.) whether the liquidators had power under the provisions of the Building Societies Acts and of the rules of the plaintiff society to sell and transfer the mortgages without obtaining a supervision order under the Companies (Consolidation) Act, 1908, and (3.) whether the plaintiff society could transfer the mortgages without the concurrence of the mortgagors. All three points were decided in favour of the plaintiff society: see *Sun Permanent Building Society* v. *Western Suburban and Harrow Road Building Society*. (1) Subsequently the defendant society delivered an amended defence in which they pleaded (*a*) that both parties entered into the contract under the mistaken belief that the transaction was a transfer of engagements under s. 33 of the Building Societies Act, 1874 (which it was not); alternatively, that the directors of the defendant society entered into the contract in such a mistaken belief as entitled the defendant society to be relieved from the contract, (*b*) that the plaintiffs knew through their agent Frost, who was an auditor of the defendant society, that the defendant society had not surplus funds sufficient for the purchase of the mortgages and that the directors thereof were not acting under s. 25 of the Building Societies Act, 1874, and the plaintiffs therefore were not entitled to specific performance, (*c*) that the plaintiffs were unable to assign to the defendant society the benefit of the mortgagors'

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covenants to pay the fines and other payments (other than the principal and interest) secured by the mortgages, (*d*) that the unexhausted borrowing powers of the defendant society were insufficient to carry out the contract, and no order ought to be made which would compel the directors of the defendant society to contravene the Building Societies Acts or to commit a breach of trust, (*e*) that it would be a breach of trust on the part of the directors of the defendant society to invest its surplus funds upon the mortgage securities comprised in the contract.

Jenkins K.C. and *E. A. Wurtzburg* for the plaintiffs. Most of the points raised by the amended defence are precluded by your Lordship's decision on the Special Case. There has been no mutual mistake. The plaintiff society is not affected by what Frost knew, and direct knowledge or notice is not alleged. The principal moneys secured by the mortgages are now reduced by the payments of the mortgagors to 4720*l.* The only question is whether the plaintiff society is entitled to specific performance (1), and the onus is on the defendant society to show why it should not be granted.

Owen Thompson K.C. and *E. A. Jennings* for the defendants. We admit that the onus is on us. The defendant society is still willing to take over the mortgages as a transfer of engagements under s. 23 of the Building Societies Act, 1874, so that the mortgagors will become members of the defendant society and will be liable to pay fines which are the same in both societies. For this purpose meetings of both of the societies should be held and resolutions should be passed. If there was not a mutual mistake, there was a unilateral mistake on the part of the directors of the defendant society as to the subject matter of the contract. They thought the mortgagors would become members of the defendant society which would obtain under the contract the benefit of the fines. It was part of the implied bargain that the mortgagors should become members of the defendant society. Further, at no material date were there any surplus funds properly available for

(1) [1920] 2 Ch. 144, 153–4.

investments in these mortgages which, although they are in terms real and leasehold securities, are not under the circumstances authorized investments for trustees. A building society acting by its directors who are its agents is in a fiduciary position at any rate as regards its members, and to enforce such a contract would compel the directors to commit a breach of trust and might render them liable to an action for damages by its members. The authorities establish that the Court will not enforce against a principal a contract founded on a dereliction of duty on the part of an agent, nor compel a person to do that which he is not lawfully competent to do, Fry on Specific Performance, 6th ed., p. 194; *Harnett* v. *Yielding* (1); *Mortlock* v. *Buller* (2); *Delves* v. *Gray*. (3) To buy the mortgages of another building society was no part of the duties of the directors: *Grimes* v. *Harrison* (4), moreover there was no valuation and no inspection of the properties. Lastly, the fines are a material part of the securities, and we shall be unable to recover them when the plaintiff society is dissolved, because the mortgagors will not be members of the defendant society and are not bound by the judgments in the Special Case.

Jenkins K.C. in reply. On the evidence we submit that at all material dates the defendant society has had sufficient funds to complete the purchase, and your Lordship has held that at the date of the contract the defendant society was bound—i.e., that the contract was intra vires. As to the objection that if specific performance be decreed it will not be lawful to carry out the contract because it will involve the directors in a breach of trust, we contend that this case has nothing to do with trustees and cestuis que trust. A building society is in exactly the same position as a trading corporation, and its directors are not bound by the strict rules that apply to trustees of wills or settlements: *Sheffield and South Yorkshire Permanent Building Society* v. *Aizlewood*. (5) Here the principal is bound by the act of its agents. Inadequacy

(1) (1805) 2 Sch. & Lef. 549, 553–4.
(2) (1804) 10 Ves. 292, 312.
(3) [1902] 2 Ch. 606.
(4) (1859) 26 Beav. 435, 444.
(5) 44 Ch. D. 412, 452–3.

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of price is not suggested, and the fact that the contract may be wrong as between the principal and the agents is no answer to specific performance, although it may be a case of hardship on them. We contend that they can borrow to complete the contract.

[P. O. LAWRENCE J. referred to *Moye* v. *Sparrow*. (1)]

That was a decision under the old law. The society there was limited to borrowing to make advances to its members only. Here the defendant society has under its rules an unfettered power of borrowing, and the point is whether it is such an improvident bargain that it ought not to be enforced. *Mortlock* v. *Buller* (2) does not apply it was a case of trustee and cestui que trust. *Grimes* v. *Harrison* (3) is also distinguishable. There the directors were acting illegally as a land society. During 1919 and 1920 the directors received ample funds out of which they could have paid the purchase price. We rely on the principle of *Eastern Counties Ry. Co.* v. *Hawkes*. (4)

Owen Thompson K.C. on the case last cited.

Cur. adv. vult.

March 2. P. O. LAWRENCE J. After the trial of this action certain negotiations took place which I hoped might have resulted in a settlement of the dispute between the parties, but unfortunately these negotiations have failed and the parties now desire that I should give my decision on the question whether the plaintiff society is entitled to specific performance. I have at an earlier stage of the proceedings in this action decided, first, that the contract of May 28, 1919, was not ultra vires the defendant society; secondly, that the plaintiff society had power to sell the mortgage securities the subject matter of the contract; and thirdly, that the mortgage securities were transferable without the concurrence of the various mortgagors. (5) The result of

(1) (1870) 18 W. R. 400.
(2) 10 Ves. 292.
(3) 26 Beav. 435, 446.
(4) 5 H. L. C. 331, 359–61, 370–1.
(5) [1920] 2 Ch. 144.

that decision is that the contract is binding upon the defendant society. At the trial the defendant society, however, resisted the claim of the plaintiff society to have the contract specifically performed under the following circumstances. [His Lordship then stated the negotiations that led up to the contract, and ultimately to the issue of the writ in the action, and continued :] The statement of claim was delivered on October 29, 1919. Up to this time apparently neither the directors nor their legal advisers had given a thought as to whether the contract was ultra vires the defendant society, or as to whether (even if intra vires) the directors were justified in entering into it. In its defence (which was delivered on November 19, 1919) however the defendant society raised the point that the transaction was ultra vires the defendant society, as well as the points as to the necessity for a supervision order and for the concurrence of the mortgagors. After I had given my decision on these three points (1) the defendant society delivered an amended defence raising the further point that the directors were guilty of misfeasance or breach of trust in entering into the contract, and that therefore the Court would not grant specific performance but would at most order the defendant society to pay a small sum by way of damages.

The main grounds for alleging a breach of trust on the part of the directors is that at the date when they entered into the contract the defendant society had no funds properly available for investment. Moreover the defendant society alleges that since the date of the contract it has not had any such funds and that to compel it to specifically perform the contract would be compelling it to apply its funds in a manner contrary to the provisions of its rules and of the Building Societies Acts. In order to appreciate these contentions it is necessary to give a short summary of the financial position of the defendant society as proved at the trial.

On May 28, 1919 (the date of the contract), the defendant society had the sum of 2500*l.* on deposit at the bank and had a borrowing capacity of 6382*l.* 14*s.* 4*d.* Withdrawal notices had been given for sums amounting to 2121*l.* 10*s.* 4*d.* On

(1) [1920] 2 Ch. 144.

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June 14, 1919 (the date fixed for completion), the defendant society had the sum of 2500*l.* on deposit at the bank and had a borrowing capacity of 5892*l.* 5*s.* 2*d.* Withdrawal notices had been given for sums amounting to 2121*l.* 10*s.* 4*d.* On August 28, 1919 (the date of the issue of the writ), the defendant society had the sum of 3500*l.* on deposit at the bank and had a borrowing capacity of 5239*l.* 10*s.* 10*d.* Withdrawal notices had been given for sums amounting to 2971*l.* 10*s.* 4*d.* On January 17, 1921 (the date of the commencement of the trial), the defendant society had a sum of 1593*l.* 2*s.* 2*d.* (part of which was on deposit at the bank and the rest of which stood to the credit of its current account or consisted of cash in hand) and a borrowing capacity of 6118*l.* 4*s.* 9*d.* Withdrawal notices had been given for sums amounting to 3976*l.* 10*s.* 4*d.* In arriving at the borrowing capacity of the defendant society at these various dates due regard has been had to the provisions of s. 15 of the Building Societies Act, 1874, and s. 14 of the Building Societies Act, 1894. It was suggested in the course of the trial that the nominal amount of certain preference shares should be treated on the footing of loans or deposits for the purpose of estimating the borrowing capacity of the defendant society, but this point was abandoned by counsel for the defendant society as untenable, and I have not taken this amount into consideration in stating the borrowing capacity of the defendant society. This fact accounts for the difference in the figures I have just stated and those contained in the Special Case. Although the figures I have stated accurately represent the position of the defendant society, if a balance had been struck at the end of each of the dates I have mentioned, they do not throw much light on the real financial position of the defendant society nor do they convey any idea of the business done or the moneys received and disbursed during the intervening periods. An examination of the books and balance-sheets of the defendant society however has revealed that during the period from May 20, 1919, to December 31, 1919, the defendant society received 9451*l.* 1*s.* 5*d.* in cash and made fresh advances on mortgage amounting to 3854*l.* 2*s.* 11*d.* and made repayments to withdrawing members amounting

to 789*l.* 0*s.* 4*d.*, besides placing 2000*l.* on deposit at its bank, and that during the year 1920 the defendant society received 14,117*l.* 9*s.* 6*d.* in cash and made fresh advances on mortgage amounting to 9313*l.* 2*s.* 9*d.* and made repayments to withdrawing members amounting to 1322*l.* 2*s.* 6*d.*, besides placing 2000*l.* on deposit at its bank.

The defendant society now contends that regard being had to the financial position as above indicated there never were any funds properly available for investment in the mortgages the subject-matter of the contract of May 28, 1919, and that, if the Court were to grant specific performance of that contract, the directors might be held liable for misfeasance or breach of trust. Although I do not intend in this action to decide either whether there were any such funds or whether the directors were so liable, I desire to say that having seen the directors in the witness box and having heard their evidence I am convinced that they acted throughout in the bona fide belief that the transaction was one which they could properly enter into, and that it was one which was in the best interests of the defendant society. It is evident that the many legal points which have since been raised in connection with this transaction never crossed the minds of the directors until after they had consulted their legal advisers. They looked upon the transaction as a pure matter of business which they honestly thought would be to the advantage of the defendant society. Although the exact amount of moneys available for investment was not ascertained by the directors in special reference to the transaction in question, I am satisfied from their evidence that they had a pretty accurate knowledge of the general financial position of the defendant society at the time and that they considered that sufficient funds were properly available to justify them in entering into the transaction. In this connection it must be borne in mind that the directors under the amended Rule XVIII. had power to limit the repayments in respect of withdrawals. In these circumstances I think it is at least open to doubt whether the Court would hold that the transaction amounted to misfeasance or a breach of trust on their part. Considering that the defence to this action was

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conducted on the instructions of the directors who made the contract, I can well understand the reluctance of Mr. Owen Thompson to assert definitely that the directors had in fact been guilty of misfeasance or breach of trust in relation to the transaction. Mr. Jenkins, however, was content to argue the case on the assumption that the directors may have committed a breach of duty in entering into the contract of May 28, 1919, and he maintains that, notwithstanding such may have been the case, the plaintiff society is entitled to specific performance, I propose therefore to deal with the case on that footing.

It is well established that the Court will not in general make a decree for specific performance where to do so would necessitate a breach of trust: see Fry on Specific Performance, 6th ed., pp. 194 et seq. and cases there cited. Lord Eldon in *Mortlock* v. *Buller* (1) says that he would hesitate long before stating clearly that this doctrine does not apply to cases where a gross breach of duty has been committed by an agent towards his principal, and in *Shrewsbury and Birmingham Ry. Co.* v. *London and North Western Ry. Co.* (2) Knight Bruce L.J. seems to have considered this doctrine applicable to the case where directors of a railway company had committed a breach of duty to the prejudice of the shareholders and where the plaintiff was throughout cognisant of the true nature of the circumstances. In my judgment however this doctrine is not applicable to the facts of this case. In the first place, I am clearly of opinion that a building society is not a trustee of its funds for its members so as to bring it within the doctrine that the Court will not specifically enforce a contract where to do so would be to compel a trustee to commit a breach of trust. A building society is an association formed under particular Acts of Parliament for special purposes, one of which—as was pointed out by Stirling J. in the *Sheffield Building Society's Case* (3)—is the acquisition of gain in the shape of a high rate of interest by the investing members. In my judgment it is no answer to an action for specific performance of a contract made by a building society acting within

(1) 10 Ves. 292, 313.
(2) (1853) 4 D. M. & G. 115; (1857) 6 H. L. C. 113.
(3) 44 Ch. D. 412, 453.

its statutory powers to say that the contract is one which is detrimental to the interests of the members of the society or one which, if it had been entered into by a trustee of a settlement or will, the Court would not have enforced on the ground that it was hazardous or that no proper valuation had been obtained, or for any other similar reason. In the present case, moreover, no evidence has been adduced to show that the contract is an unprofitable one or one which is prejudicial to the interests of the members of the society. Therefore this case is not even analogous to the case where a trustee has entered into a contract specific performance of which would operate to the detriment of his cestuis que trusts. In this connection it may not be out of place to consider what are the real reasons why the defendant society is resisting the plaintiff society's claim in this action. The directors of the defendant society in the first instance desired to withdraw from their bargain, because they were advised there was a doubt as to the plaintiff society being able to confer a good title upon the defendant society. Later on they were told that the transaction might, if it should prove unprofitable, involve them in an action for damages for breach of trust. And still later on it seems to have occurred to the directors that there might be a difficulty in the defendant society acquiring the right to enforce payment by the mortgagors of any fines if they were in arrears with their monthly instalments. It is the fear that these two last mentioned grounds might prove to be well grounded which in my opinion has determined the directors to persist in defending this action notwithstanding my decision on the preliminary points. It is clear from the evidence that the plaintiff society had no knowledge or notice that the contract was otherwise than regularly and properly entered into by the defendant society. I am further of opinion that, even if the facts proved at the trial disclose some breach of duty on the part of the directors of the defendant society, they do not disclose such a gross breach of duty on their part as to bring the case within the dictum of Lord Eldon in *Mortlock* v. *Buller*. (1) Nor do the facts in my

(1) 10 Ves. 292.

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opinion bring this case within the *Shrewsbury and Birmingham Ry. Case*. (1) That case was ultimately decided upon a different point from the one I am now considering. Although Lord Chelmsford in the House of Lords did not express any dissent from the view taken by Knight Bruce L.J., yet his interpretation of the real grounds of the decision of that learned Lord Justice was that the contract in that case was palpably so unequal and so unjust in its operation as fairly to lead to the inference that its effect could not have been fully apprehended by the parties or at all events by the parties against whom it was sought to be enforced. (2) In dealing with this part of the case it must be remembered that directors of such a society as the defendant society must have a large discretion vested in them, and in my opinion such discretion extends to the time when and the circumstances under which they ought to invest the funds of the society. Mere imprudence or want of judgment as to the time for investment and as to the funds available for investment cannot in my judgment be said to amount to gross negligence. Now that the facts of the present case have been fully investigated I am of opinion that it falls directly within the principle of the decision of the House of Lords in *Eastern Counties Ry. Co.* v. *Hawkes*. (3) In that case it was held that the plaintiff was entitled to specific performance of an agreement entered into by the company notwithstanding that the directors had thereby contracted to purchase property which was not required for the extraordinary purposes of the railway and notwithstanding that such purchase might become a question between them and the shareholders. Lord St. Leonards at the end of his speech (4) says: "I hope we shall have no other cases before us where the defence of a company rests upon the want of power to make a contract which the directors deliberately enter into, and under which they took a benefit, or upon the irregularities of their own proceedings." I know of no case where the Court has refused to decree specific performance of a contract for the sale of land merely because the defendant's

(1) 4 D. M. & G. 115; 6 H. L. C. 113.
(2) 6 H. L. C. 139.
(3) 5 H. L. C. 331.
(4) 5 H. L. C. 382.

authorized agent acting honestly has committed some breach of duty towards his principal by entering into it, much less where he had done so owing merely to a want of prudence or an error of judgment, and where in either case the purchaser has had no knowledge or notice of any irregularity on the part of the vendor's agent. I think that to give countenance to any such doctrine would be highly mischievous. It is next contended that the defendant society is not legally competent to perform the contract, because in doing so it would have to purchase an investment at a time when it has no funds properly available for that purpose. In my judgment this point is really concluded by my decision that the contract is binding on the defendant society. The defendant society by virtue of the contract became indebted to the plaintiff society in the purchase money and it must pay its debts like any other corporation. It has never been held an answer to a vendor's action for specific performance that the purchaser is unable to pay the purchase money. In the present case, moreover, it is proved not only that the defendant society since the date of the contract has had ample funds to complete the purchase but that at the present time it is well able to do so. In my judgment this point has no substance in it. It was also contended that the directors were guilty of a breach of trust, because the mortgages which the defendant society had contracted to buy are not such as ordinary trustees ought properly to invest in, such mortgages being repayable by instalments and therefore tending unduly to lock up the money of the defendant society. Further, it is said that the directors ought to have obtained independent valuations of the mortgaged properties before entering into the contract. In my judgment neither of these contentions affords any answer to this action; they are covered by the decision in the *Sheffield Building Society's Case* (1), which is a clear authority that directors of a building society are not fettered by the rules applicable to ordinary trustees as to the nature of the securities which they may invest upon. Lastly, it is said that there may be some difficulty in the way of the

(1) 44 Ch. D. 412, 453.

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defendant society obtaining the benefit of the fines imposed upon the mortgagors by the plaintiff society's rules, although they are expressly secured by the terms of the mortgages. The liquidators of the plaintiff society have by their counsel stated that they are willing to do all in their power to give the defendant society the full benefit of the mortgages, including the fines, and I cannot help thinking that the ingenuity of counsel will find some way of enabling the defendant society to obtain this benefit. The transferee of a building society's mortgage is notoriously in a difficult position in a case like the present where the mortgage itself contains no provision regulating the rights of the parties after transfer. I do not however intend on the present occasion to determine what form the documents which may be necessary to give the defendant society the full benefit of the mortgages ought to take; these documents will have to be settled by the Court under the decree I propose to make in the event of any disagreement between the parties as to their contents. What I do decide on this point is that if the result of the defendant society obtaining a transfer of these mortgages is that the obligation on the mortgagors to pay fines is no longer operative, such a result is the natural consequence of the defendant society taking a transfer of the mortgages and is not a sufficient ground for refusing a decree for specific performance of the contract. In the result, for the reasons stated, I hold that all the various points taken by the defendant society fail and that the plaintiff society is entitled to a decree for the specific performance of the contract.

Solicitors for the plaintiffs: *Naunton & Son.*
Solicitor for the defendants: *Graham Gordon.*

H. L. F.

authorized agent acting honestly has committed some breach of duty towards his principal by entering into it, much less where he had done so owing merely to a want of prudence or an error of judgment, and where in either case the purchaser has had no knowledge or notice of any irregularity on the part of the vendor's agent. I think that to give countenance to any such doctrine would be highly mischievous. It is next contended that the defendant society is not legally competent to perform the contract, because in doing so it would have to purchase an investment at a time when it has no funds properly available for that purpose. In my judgment this point is really concluded by my decision that the contract is binding on the defendant society. The defendant society by virtue of the contract became indebted to the plaintiff society in the purchase money and it must pay its debts like any other corporation. It has never been held an answer to a vendor's action for specific performance that the purchaser is unable to pay the purchase money. In the present case, moreover, it is proved not only that the defendant society since the date of the contract has had ample funds to complete the purchase but that at the present time it is well able to do so. In my judgment this point has no substance in it. It was also contended that the directors were guilty of a breach of trust, because the mortgages which the defendant society had contracted to buy are not such as ordinary trustees ought properly to invest in, such mortgages being repayable by instalments and therefore tending unduly to lock up the money of the defendant society. Further, it is said that the directors ought to have obtained independent valuations of the mortgaged properties before entering into the contract. In my judgment neither of these contentions affords any answer to this action; they are covered by the decision in the *Sheffield Building Society's Case* (1), which is a clear authority that directors of a building society are not fettered by the rules applicable to ordinary trustees as to the nature of the securities which they may invest upon. Lastly, it is said that there may be some difficulty in the way of the

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defendant society obtaining the benefit of the fines imposed upon the mortgagors by the plaintiff society's rules, although they are expressly secured by the terms of the mortgages. The liquidators of the plaintiff society have by their counsel stated that they are willing to do all in their power to give the defendant society the full benefit of the mortgages, including the fines, and I cannot help thinking that the ingenuity of counsel will find some way of enabling the defendant society to obtain this benefit. The transferee of a building society's mortgage is notoriously in a difficult position in a case like the present where the mortgage itself contains no provision regulating the rights of the parties after transfer. I do not however intend on the present occasion to determine what form the documents which may be necessary to give the defendant society the full benefit of the mortgages ought to take; these documents will have to be settled by the Court under the decree I propose to make in the event of any disagreement between the parties as to their contents. What I do decide on this point is that if the result of the defendant society obtaining a transfer of these mortgages is that the obligation on the mortgagors to pay fines is no longer operative, such a result is the natural consequence of the defendant society taking a transfer of the mortgages and is not a sufficient ground for refusing a decree for specific performance of the contract. In the result, for the reasons stated, I hold that all the various points taken by the defendant society fail and that the plaintiff society is entitled to a decree for the specific performance of the contract.

Solicitors for the plaintiffs: *Naunton & Son.*
Solicitor for the defendants: *Graham Gordon.*

H. L. F.

In re DRAKE.

DRAKE *v.* GREEN.

[1920. D. 1183.]

P. O. LAWRENCE J.

1920 *Nov.* 10.

1921 *April* 13, 14.

Will—Legacies—"Outdoor and indoor servants"—Farm Labourers—Period of Service—Break in Service—Military Service.

A testator, who was tenant for life of an estate, comprising a mansion house, a home farm, woodlands and other lands, resided at the mansion house, retained and managed the home farm and woodlands, and let the other lands. Besides domestic servants, he employed an estate cashier, a farm bailiff, a dairymaid, an engineer, a blacksmith, gardeners, carters, carpenters, gamekeepers, woodmen, bricklayers, farm hands and labourers, who respectively were paid weekly, monthly or quarterly wages as the case might be.

The testator died in 1919, and by his will, after giving a pecuniary legacy to two of his indoor servants, bequeathed to each other of his "indoor and outdoor servants" who should have been in his service for ten years prior to his decease the sum of two hundred pounds in addition to any moneys owing to them respectively by him at his decease, and to each other of his "indoor and outdoor servants" who should have been in his service for five years but less than ten years "the amount of one year's wages" in addition to any moneys owing to them by him at his decease:—

Held, that all of the above employees who qualified by length of service were included in the bequest.

In re Forrest [1916] 2 Ch. 386 not followed.

Some of the above employees joined the colours during the war on the understanding that their places would be kept open for them and, on the termination of their military service, returned to the testator's service:—

Held, that the period of their military service could not be deemed service with the testator, but that their service with the testator before and after their military service could be aggregated in computing the qualifying period of the bequest.

In re Cole [1919] 1 Ch. 218 distinguished.

ADJOURNED SUMMONS.

W. W. T. Drake, by his will dated August 9, 1918, after appointing the plaintiff his executors and trustees and making divers specific and pecuniary bequests, including legacies of 500*l.* to the defendant Mary Long (his secretary), 500*l.* to Thomas Meeton (his butler), and 500*l.* to James Ladbrooke (his valet), bequeathed as follows:—

"To each other of my indoor and outdoor servants who

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shall have been in my service for upwards of ten years prior to my death and shall not be under notice to leave whether given or received the sum of two hundred pounds in addition to any moneys owing to them respectively by me at my death.

"To each other of my indoor and outdoor servants who shall have been in my service for upwards of five years but less than ten years prior to my death and shall not be under notice to leave whether given or received the amount of one year's wages in addition to any moneys owing to them respectively by me at my death."

And the testator bequeathed the residue of his personal estate upon trusts for the defendants Mary Long and Hester Upton (married woman).

The testator was tenant for life of a freehold estate in Buckinghamshire, known as Shardeloes, comprising a mansion house and grounds, a home farm of about 270 acres, a timber yard of about 2 acres, 904 acres of woodlands, and some 3700 acres of farm lands and cottages. The testator during his life resided at Shardeloes and retained in his own hands the home farm, the timber-yard and woodlands, and let the farm lands and cottages. In addition to domestic servants the testator employed a coachman, a groom, a chauffeur, an engineer for the electric lighting of the mansion house, an estate clerk and cashier, and gardeners; and for the home farm, timber-yard and woodlands he employed a farm bailiff, a dairymaid, a cowman, a blacksmith, a foreman, and carters, carpenters, bricklayers, gamekeepers, woodmen, farm hands and labourers. All the above employees were paid weekly, monthly or quarterly wages as the case might be. The testator was also tenant for life of other estates in Lincolnshire and Cheshire which he let, except the woodlands for which he employed woodmen and labourers at weekly wages. Many of the above employees had been in the testator's service for five and ten years respectively and upwards, and the question arose whether all or any and which of them were included in the above bequest to "indoor and outdoor servants," and the executors issued a summons to determine the matter. In support of this summons the plaintiffs filed an affidavit

containing schedules giving a complete list of all the persons in the service of the testator at the time of his death. Some of the employees served with the colours during the war for various periods. All joined under the clear understanding that their places would be kept open for them on the termination of their military service, and on being released from such service they returned to the testator's service.

The defendant Mary Long, who had been the testator's secretary for nine years and took large benefits under the will, made no claim under the above bequest.

G. S. Tetley for the plaintiffs.

Jenkins K.C. and *T. K. Crossfield* for the defendant Upton. The term " servant " means a person who more or less comes into contact with his master and ministers in some way or other to his personal comforts or wants: *In re Forrest* (1); *Booth* v. *Dean* (2); *Thrupp* v. *Collett* (No. 2) (3); and does not here include persons employed at the timber-yard or on the home farm or in the woods. The point now before the Court was not raised in *In re Earl of Sheffield* (4) either before Neville J. or in the Court of Appeal. Further, a servant, whilst in His Majesty's service, cannot be said to have been at the same time in the service of the testator, and such time cannot be taken into account in reckoning the qualifying period mentioned in the legacy. *In re Cole* (5) may be cited against us, but is distinguishable. There there was a clear intention that the employment should continue, and in *Herbert* v. *Reid* (6) the servant never really left the service of the testator.

Bryan Farrer for the defendant Mary Long adopted the same line of argument.

Owen Thompson K.C. and *C. Myles* for the defendant Green (the farm bailiff) and other defendant employees. The language of the bequest is not confined to domestic servants, but applies to all servants in the most general terms, and the only qualification is length of service. The view of

(1) [1916] 2 Ch. 386.
(2) (1833) 1 My. & K. 560.
(3) (1858) 26 Beav. 147.
(4) [1911] 2 Ch. 267.
(5) [1919] 1 Ch. 218, 223.
(6) (1810) 16 Ves. 481.

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Sargant J. in *In re Forrest* (1) is novel, and is not borne out by the authorities. In *In re Ravensworth* (2), under a gift of a year's wages to "all servants" in the employment of the testator, Joyce J. held that there was no distinction in the gift between indoor and outdoor servants, domestic and farm servants, but felt himself bound by the authorities to decide that under a gift of "a year's wages" no servant could take except those who were hired by the year, and his decision was affirmed by the Court of Appeal. Farm labourers were included in a gift to indoor and outdoor servants in *In re Earl of Sheffield* (3), which is directly in point, and Buckley L.J. in his judgment distinguishes *Booth* v. *Dean*. (4) In *Bulling* v. *Ellice* (5) a farm bailiff and in *Armstrong* v. *Clavering* (6) a land agent was held to be a servant. *Ogle* v. *Morgan* (7) is distinguishable on the ground that the gift there was of a year's wages as in *In re Ravensworth*. (8) On the question of military service, *In re Cole* (9) decides that a servant whilst on military service may still be in his master's service. It is a question of intention. Here nine servants joined the Forces on the understanding that their places would be kept open for them, and it is submitted that the inference is that there was a concurrent service, or that there was no cesser of the service with the testator, and that the years of military service ought to count as part of their service with the testator. But if this view is not correct, it is submitted the will does not say that the period of service must be continuous, and that service before and after the period of military service should be taken into account in computing the period of service with the testator.

P. O. LAWRENCE J. The first question raised by this summons is as to the true meaning of the words "indoor and outdoor servants" in the will of the testator.

(1) [1916] 2 Ch. 386, 389.
(2) [1905] 2 Ch. 1, 3.
(3) [1911] 2 Ch. 267.
(4) 1 My. & K. 560.
(5) (1845) 9 Jur. 936.
(6) (1859) 27 Beav. 226.
(7) (1852) 1 D. M. & G. 359.
(8) [1905] 2 Ch. 1.
(9) [1919] 1 Ch. 218.

Mr. Jenkins, relying upon *In re Forrest* (1), has argued that these words ought to receive the restricted meaning of persons who have in some way ministered to the testator's personal comfort or to his wants, in other words, persons of the class of domestic servants, though not necessarily employed in the house, and the point the Court has to determine is whether that argument is well founded.

Now "indoor and outdoor servants" are perfectly general words, and there is nothing in the context in which they are used in the present will or in the surrounding circumstances to indicate an intention on the part of the testator to cut down their generality or to exclude any particular class of servants. In these circumstances to accede to the arguments addressed to me by Mr. Jenkins would, in my opinion, be to introduce a qualification not to be found in the will nor warranted by the surrounding circumstances. The Court would be guessing at an intention on the part of the testator which he has not expressed. In my judgment the only questions open for consideration in the present case are whether the claimants have proved that the relationship of master and servant existed between themselves and the testator, and if so, whether they have satisfied the condition as to length of service.

The authorities show that in the absence of any controlling context the word "servant" in a bequest such as the one now under consideration will receive a comprehensive meaning: see, e.g., *Bulling* v. *Ellice* (2) and *Armstrong* v. *Clavering*. (3) In the former a farm bailiff and in the latter a land agent was held to be a "servant." The more modern cases of *In re Ravensworth* (4) and *In re Earl of Sheffield* (5), in my judgment, strongly bear out that this is now the accepted view. In *In re Ravensworth* (4) certain servants, including woodmen, keepers, masons and hinds employed at a weekly wage were excluded from a bequest to "all servants who shall be in my employment at my death," not because they

(1) [1916] 2 Ch. 386.
(2) 9 Jur. 936.
(3) 27 Beav. 226.
(4) [1905] 2 Ch. 1.
(5) [1911] 2 Ch. 267.

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did not come within the definition of "servants," but because the bequest was framed in such a manner as to confine it to servants receiving a yearly wage to the exclusion of servants employed at a weekly wage. Joyce J. (1) expressly pointed out that the gift in that case was in general terms, and that the testator had not drawn any distinction between indoor and outdoor servants or between domestic servants and farm servants. None of the members of the Court of Appeal cast any doubt on the correctness of this view, and the obvious inference is that both Courts would have held that the woodmen, keepers, masons and hinds would have taken legacies as "servants" if they had been employed at a yearly wage. In *In re Earl of Sheffield* (2) the bequest was to "my servants (indoor and outdoor)," and the question was whether twelve outdoor servants comprising under-gardeners, estate carpenters, estate labourers, a lodge-keeper and an errand or odd job man were included in the bequest. Both Neville J. and the Court of Appeal held that they were so included. It is true that the immediate point there argued was whether the bequest was framed so as to include servants employed at a weekly wage as well as servants employed at a yearly wage, but neither the counsel engaged in that case nor any of the learned judges who took part in the decision seem to have had any doubt that the twelve servants concerned were outdoor servants within the meaning of the bequest, and I think I am justified in assuming that the reason for this was that they considered it well settled that the word "servant" when unqualified by the context ought to receive a comprehensive meaning.

I now come to the decision of Sargant J. in *In re Forrest.* (3) I need hardly say that I attach great weight to the opinion of that learned judge, and that I distrust my own opinion when it differs from his. Although the decision in that case was expressly confined to the construction of the particular will there before the Court (in which will the words "indoor and outdoor" did not occur), yet as it was not suggested

(1) [1905] 2 Ch. 1, 3. (2) [1911] 2 Ch. 267.
(3) [1916] 2 Ch. 386.

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that there was any controlling context in that will, Mr. Jenkins was fully justified in pressing that case on the Court as a decision directly in point on the question I have to decide. It was there held that the word "servants" ought to receive the limited meaning which it is contended the words "indoor and outdoor servants" ought to be held to bear in the present case. I do not feel myself at liberty to give any such restricted meaning to the words of the present will. Many wills (including in all probability the present will) must have been drawn and many wills (including the will in the *Earl of Sheffield's Case* (1)) must have been acted upon in reliance upon the comprehensive meaning hitherto given by the Court to the word "servants." With the greatest respect to Sargant J. it seems to me that the limitation he has imposed upon that word in *In re Forrest* (2), besides being contrary to the current of authority, might in many cases give rise to great difficulty. In my opinion every servant ministers in some way either to the personal comfort or to the wants of his or her master. The difficulty I have in mind is exemplified in *In re Forrest* (2) itself, where an underkeeper was admittedly included as a servant whilst farm servants were held to be excluded. I cannot help asking myself if keepers are servants, why are not woodmen; and if woodmen, why not farm servants? Obviously the line cannot be drawn according to whether the testator happened to be more fond of shooting than of forestry or farming.

In view of the many authorities on this subject it is of course far too late at the present day for the Court to hold that the meaning of "servants" in a bequest of this kind is confined to purely domestic servants, and Sargant J. was careful not to go so far as this. For the reasons which I have shortly expressed, I feel myself compelled to differ from the opinion expressed by that learned judge and unable to follow the decision in *In re Forrest* (2) if and so far as it can properly be said to govern my decision in this case. Counsel has called my attention to what appears to be a slip in the judgment in *In re Forrest.* (2) From the report of that case it

(1) [1911] 2 Ch. 267. (2) [1916] 2 Ch. 386.

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appears that the learned judge stated that in *In re Earl of Sheffield* (1) the estate labourers and other outdoor servants were held to have been excluded from the bequest, whereas the contrary is the case. I do not, however, for a moment think that the learned judge was under any real misapprehension as to the effect of the decision in *In re Earl of Sheffield* (1) or that this slip in any way detracts from the force of his judgment.

In the result I hold that all the persons named in the schedules to the plaintiffs' affidavit who fulfil the conditions as to length of service (with the exception of Mary Long, whose claim was expressly withdrawn at the hearing on personal grounds) are entitled to legacies as indoor or outdoor servants under the testator's will.

The next point which I have to decide arises in this way. Some of the servants joined the colours during the war, and were absent from the testator's service for varying periods. The question is whether the period of their military service can be counted in the ten years or five years, as the case may be, for the purpose of qualifying them for the legacies given by the will. It is argued by Mr. Owen Thompson that these servants continued in the service of the testator, notwithstanding that they were serving with H.M. Forces, and in support of his argument he relies upon the decision in *In re Cole*. (2) There Sargant J. held, under special circumstances, that a gentleman had not ceased to be in the employ of a company, although he had voluntarily enlisted and was still serving in His Majesty's Forces. But in my opinion the facts of that case are altogether different from the facts we have here. In that case the learned judge concluded as a fact that the employment by the company continued, although there was a temporary dispensation by the directors under which the legatee was not bound to render actual service to the company during the time he was employed in His Majesty's Forces. In the present case I can come to no such conclusion. The persons concerned were servants employed at a weekly wage. Some of them voluntarily enlisted, and others were

(1) [1911] 2 Ch. 267. (2) [1919] 1 Ch. 218.

compelled to join the colours. In all cases they left the testator's service with a promise by the testator to re-engage them on their return should they so desire. In these circumstances I regret to find myself quite unable to hold that while these men were serving in His Majesty's Forces they were in the testator's service, and that, after all, is the only point to be determined on this part of the case. I therefore most reluctantly feel compelled to make a declaration that the time during which the servants served in His Majesty's Forces, cannot be counted towards the length of their service with the testator. The only point remaining to be dealt with is whether the period of service before the servant joined the colours can be aggregated with the period of service after he came back and was re-engaged, for the purpose of making up the ten years or five years, as the case may be, under the will. In my view, the language of the will justifies me in holding that these periods can be aggregated. All that the will requires is that a servant should have been in the testator's service for upwards of ten years or five years prior to his death. I think that the language of the will does not compel me to hold that the service must necessarily have been continuous, but is wide enough to include service in which there has been a break. I therefore decide that the period of service prior to the service in His Majesty's Forces ought to be taken into account in computing the qualifying periods under the will. This decision in my opinion covers the claim of the head gardener, in whose case a break occurred, not by reason of his joining the colours, but from another cause. The head gardener was in the service of the testator from 1904 to 1911. He then left the testator's service, but was re-engaged in the year 1918, and remained in the service of the testator up to the time of the latter's death. In my judgment no logical distinction can be drawn between his case and the case of those servants who joined the colours.

Solicitors: *Dawes & Sons; Valpy, Peckham & Chaplin.*

H. L. F.

C. A.
1921
April 15, 18.

In re DICKSON'S SETTLED ESTATES.

Settled Land—Sale—Payment into Court under Settled Estates Acts—Disentailing Deed—Base Fee—Nature of disentailed Money—Conversion by Will—Money subject to be invested in the Purchase of Land—Fines and Recoveries Act (3 & 4 *Will.* 4, *c.* 74), *s.* 71.

A testator, who died in 1875, specifically devised an undivided share in freeholds to his son P. for life with remainders which never took effect and devised the residue of his real estate upon limitations which in 1878 were held by the Court to give the testator's son W. an estate tail therein. In 1877 the freeholds, the undivided share in which was devised to P. for life, were sold under the Leases and Sales of Settled Estates Act, 1856, and the proceeds of sale representing such share were paid into Court. After the sale W., who had previously executed a disentailing deed dealing in general terms with the lands devised to him by the testator's will, executed another disentailing deed dealing in terms with the undivided share and the moneys in Court resulting from the sale thereof. Neither of these deeds was executed with the consent of P. as the protector of the settlement. W. died in the lifetime of P. having by his will devised his residuary real estate to the appellant and bequeathed his personal estate to the respondents. At the death of P. in 1920 the appellant petitioned for payment out of Court of the moneys, claiming that they had passed to him as residuary devisee of W.:—

Held, that the moneys retained the character of real estate inasmuch as s. 71 of the Fines and Recoveries Act, 1833, did not convert disentailed moneys into personal estate for all purposes, but merely directed that they should be treated as personal estate for the purpose of the form of a disentailing deed.

Decision of Russell J. reversed.

Appeal by the petitioner William Dickson from so much of the order of Russell J. as declared that a sum of 4942*l.* 18*s.* India 3½ per cent. stock in Court to the credit of "Ex parte Patrick Thorp Dickson. In the matter of the Leases and Sales of Settled Estates Acts" passed as personal estate under the will of William Dickson the son and for an order that it might be adjudged that the fund passed as real estate under the will.

The following are the relevant facts which led up to the presentation of the petition:

William Dickson (the petitioner's grandfather) died on May 14, 1875, having by his will devised his estate at Tugal and Newton-by-the-Sea to his son Patrick Thorp Dickson for life with remainder to Patrick's sons in tail male, and all the rest

of his real estate to his eldest son William Dickson (the petitioner's father, hereinafter called William Dickson the son) for his life with remainder to his heirs male, the eldest surviving son to take the whole as tenant in tail and if he should have no heirs male then to go to his son Patrick Thorp Dickson and his heirs male.

Patrick Thorp Dickson eventually died on March 10, 1920, without ever having had any issue, and accordingly the testator's estate at Tugal and Newton-by-the-Sea fell into the above residuary devise under which (as declared by an order of Jessel M.R. made in 1878) William Dickson the son took an estate in tail male. (1)

The estate of the testator, William Dickson, at Tugal and Newton consisted of or included one undivided third share of certain land and premises situate at Tugal Hall and Newton-by-the-Sea in Northumberland and of certain rentcharges in lieu of tithes arising in the parish of Bamburgh in Northumberland.

By an order of the Chancery Division made on a petition under the Leases and Sales of Settled Estates Act, 1856, on February 17, 1877, this property was ordered to be sold with the concurrence of the persons entitled to, or having power to sell, the two other undivided third shares thereof, one-third of the sale moneys to be paid into Court to the credit of "Ex parte Patrick Thorp Dickson. In the Matter of the Leases and Sales of Settled Estates Acts." The property was offered for sale in ten lots by public auction. Five lots were sold at the auction. Four lots were subsequently sold with the approval of the Court. One lot still remains unsold. The fund in Court represented (after certain deductions) one-third of the purchase moneys of the property sold.

By an indenture dated October 11, 1875, duly inrolled as a disentailing assurance on October 12, 1875 (that is to say before the order for sale), William Dickson the son granted all and singular the lands tithes hereditaments and premises of which he was tenant in tail male under the will of William Dickson situate in the counties of Northumberland and

(1) See *Dickson* v. *Dickson* [1878] W. N. 187.

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Durham and the town and county of Berwick-upon-Tweed and wherever else in England unto Charles Thorp and his heirs to the use of William Dickson the son his heirs and assigns. This indenture recited the devise in the said will of the residuary real estate but recited merely that the property at Tugal and Newton-by-the-Sea was devised to Patrick Thorp Dickson "as therein mentioned." The consent of Patrick Thorp Dickson (the protector) not having been obtained, this indenture converted the estate tail of William Dickson the son in the property into a base fee.

By an indenture duly inrolled as a disentailing assurance dated September 3, 1878 (that is to say after the order for sale had been made) William Dickson the son granted and assigned (inter alia) all the estate of William Dickson the testator at Tugal and Newton-by-the-Sea and also all the moneys which should have been received and should be received from the sale of the said estate, subject to the estates limited by the said will in priority to the estate tail of William Dickson the son and subject also to the estates to take effect after the determination of such estate tail, unto Charles Thorp and his heirs executors and administrators to the use of William Dickson the son his heirs executors administrators and assigns. In the case of this deed also the consent of the protector was not obtained, and by the terms of the deed itself the interest acquired thereunder by William Dickson the son was expressed to be subject to the estates to take effect after the determination of his estate tail.

William Dickson the son died on February 11, 1887. By his will, dated January 19, 1887, he devised all his freehold and copyhold hereditaments in England to his wife Frances Dickson for her life and from and after her decease he disposed of them in the following terms: "from and after her decease I leave and bequeath my whole lands and heritable estate in Scotland to my son William Dickson absolutely and I devise my freehold and copyhold hereditaments in England and Berwick-upon-Tweed (subject to the life interest of my said wife) as follows—to my son Campbell Cameron Forster

Dickson" certain property specifically named, "to my son Goldsborough Dickson" certain other properties specifically named, "to my daughter Frances Creuze Dickson" other properties specifically named, "to my son William Dickson my moiety of the Spital Hall Estate including the waterworks situate in the parish of Tweedmouth and all the residue of my real estate." Then there were provisions in the will: "during the minority of any of my sons for the time being entitled in possession under this my will (and for all the purposes of this my will their minority shall be deemed to extend to the age of 25 years) to the hereditaments hereinbefore devised or any share thereof my trustees shall manage the same hereditaments or share and receive the rents and profits thereof and shall with and out of the said rents and profits and the moneys to arise from the sale of any timber or other trees standing on the said hereditaments pay in the first place the expenses attending the management of the said hereditaments or share and all other outgoings affecting the same and shall in the next place apply such sum or sums as they may think fit for the maintenance and education or otherwise for the benefit of such minor and shall accumulate the surplus of such rents and profits at compound interest." The will also contained powers of leasing "the said premises" and of cutting timber. The residue of his personal estate he disposed of for the benefit of his wife during her life and after her death for the benefit of his three daughters equally to be divided between them. Frances Dickson died on March 30, 1913.

Patrick Thorp Dickson died on March 10, 1920, without ever having had any issue.

With regard to the title of William Dickson's co-petitioners it is sufficient to state that, if the petitioner William Dickson was entitled to the fund, under his father's will his co-petitioners were as against him entitled as the trustees of his marriage settlement to receive it, and he was willing that they should do so.

The petition was presented by William Dickson and the trustees of his marriage settlement, and it asked for payment

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out of the fund to William Dickson's co-petitioners on the footing that William Dickson was absolutely entitled thereto.

The three first respondents were the two daughters of William Dickson the son and the representative of a third daughter who had died, the residuary legatees of the personalty and the two remaining respondents (sons of William Dickson) were Campbell Cameron Forster Dickson and Goldsborough Dickson, who were respondents to the petition for sale.

Russell J. in a considered judgment, after holding that under the Settled Estates Acts the fund in Court, being subject to an obligation to be reinvested in land, could not be treated otherwise than as real estate, and that William Dickson the son was never in a position to elect to treat it as personal estate, proceeded to deal with the contention urged on behalf of the daughters of William Dickson the son that there had been a statutory conversion into personal estate by force of the deed of September 3, 1878, and s. 71 of the Fines and Recoveries Act, 1833. (1) His Lordship after reading ss. 15

(1) Fines and Recoveries Act, 1833, s. 71: "Lands to be sold, whether freehold or leasehold, or of any other tenure, where the money arising from the sale thereof shall be subject to be invested in the purchase of lands to be settled, so that any person, if the lands were purchased, would have an estate tail therein, and also money subject to be invested in the purchase of lands to be settled, so that any person, if the lands were purchased, would have an estate tail therein, shall for all the purposes of this Act be treated as the lands to be purchased, and be considered subject to the same estates as the lands to be purchased would, if purchased, have been actually subject to; and all the previous clauses in this Act, so far as circumstances will admit, shall, in the case of the lands to be sold as aforesaid being either freehold or leasehold, or of any other tenure, except copy of court roll, apply to such lands in the same manner as if the lands to be purchased with the money to arise from the sale thereof were directed to be freehold, and were actually purchased and settled and shall, in the case of the lands to be sold as aforesaid being held by copy of court roll, apply to such lands in the same manner as if the lands to be purchased with the money to arise from the sale thereof were directed to be copyhold, and were actually purchased and settled; and shall, in the case of money subject to be invested in the purchase of lands to be so settled as aforesaid, apply to such money in the same manner as if such money were directed to be laid out in the purchase of freehold lands, and such lands were actually purchased and settled; save and except that in every case where under this clause a disposition shall be to be made of leasehold lands for years absolute or determinable, so circumstanced as aforesaid, or of

and 41 and the first part of s. 71 continued: "But there follow important words of exception which in terms enact that the money shall, as to the person in whose favour or for whose benefit the disposition is to be made, be treated as personal estate and the assurance shall be an assignment by deed. It is claimed that this is an enactment which, on a disentail of moneys subject to be invested in the purchase of lands to be settled, ipso facto reconverts the money back into personal estate as to the person whose estate tail is barred. After careful consideration I can see no answer to this claim it the words of the section be given their ordinary and natural meaning. It was urged on behalf of the petitioners that the words only related to the form of the assurance and that the intention of the enactment was merely to indicate that the disposition was to be effected by an assignment in favour of A. B., his executors administrators and assigns or A. B. absolutely, which is in accordance with the forms to be found in conveyancing precedents. I can find no warrant for this suggestion. The words of the section are specific and clear. Applying them to the actual case before me, the section enacts in plain terms that the fund in Court shall, as to William Dickson the son, be treated as personal estate, and I can see no justification for altering the meaning of the section or holding that it does not enact that which it purports to enact. I have only read an abridged version of the section, but I would point out that the saving and exception applies to one other case only—namely, the case of leasehold lands to be sold where the proceeds are to be invested in the purchase of lands. It appears to me that

money so circumstanced as aforesaid, such leasehold lands or money shall, as to the person in whose favour or for whose benefit the disposition is to be made, be treated as personal estate, and, except in case of bankruptcy, the assurance by which the disposition of such leasehold lands or money shall be effected shall be an assignment by deed, which shall have no operation under this Act unless inrolled in His Majesty's High Court of Chancery within six calendar months after the execution thereof; and in every case of bankruptcy the disposition of such leasehold lands or money shall be made by the Commissioner, and completed by inrolment in the same manner as hereinbefore required in regard to lands not held by copy of court roll."

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the intention of the Legislature was that where the lands to be entailed are to be obtained from, and owe their origin to, personal estate, then on a disentail the original nature of the property is as to the person disentailing to revive and remain. The result is that the reversionary interest of William Dickson the son did not form any part of his real estate, but passed under the gift contained in his will of his personal estate."

The petitioner William Dickson appealed. The appeal was heard on April 15, 18, 1921.

Clauson K.C. and *W. H. Horsley* for the appellant William Dickson. The fund in Court is real estate.

Two points arise in this case, (1.) upon the construction of s. 71 of the Fines and Recoveries Act, 1833, and (2.) whether the question of construction arises at all. That point was not before Russell J. It may be doubted whether the second disentailing deed is a necessary step in the appellant's title at all.

The first disentailing deed was executed before the order for sale, and s. 71 had no effect upon it. The deed of October 11, 1875, created a base fee in the realty both specifically and not specifically devised. That being so the second deed of 1878 was inoperative.

If at the date of the death of William Dickson, the son, the fund in Court was personal estate then it passed under his will as residue to those who claim against the appellant. If it was realty it passed to the appellant under his father's will as a base fee, which he has since enlarged into a fee simple.

The material words of s. 71 refer to the form of assurance only. In Hayes' Introduction to Conveyancing, 5th ed., vol. ii., p. 187, *n.* (175), the effect of the section is thus stated: "The Act directs leaseholds for years, and money, to be '*treated* as personal estate' (s. 71), but this direction has reference to the mode of assurance only; and it seems proper to express, in the assurance, the election of the tenant in tail to take the fund, whether consisting of freeholds, leaseholds for lives or for years, or money, according

to its *actual* character, and not according to its constructive equitable character. This precaution will exclude all questions between the real and personal representatives of the tenant in tail." It is submitted that that is the right view to be taken of the section. Apart from that statement by an eminent conveyancer there appears to be no authority. The object of the Act was to abolish certain forms and substitute for them more simple modes of assurance.

[YOUNGER L.J. If the fund was to be treated as personalty why was inrolment made necessary ?]

The object of the Act being merely to facilitate conveyancing one would not expect to find that its operation would effect any change in the nature of property.

[WARRINGTON L.J. It might have the effect of making the property personalty in one person's hands, and realty in those of another.]

Yes. Its real effect is that for conveyancing purposes the property was to be treated as personalty, but for other purposes as land.

In Shelford's Real Property Statutes, 9th ed., p. 288, the section is thus headed: "Mode of Disposition of Entailed Money." It is submitted that that correctly epitomises its scope and effect.

Russell J. held, in the appellant's favour, that under the Settled Estates Acts the fund in Court could not be treated otherwise than as real estate, and that William Dickson the son was not in a position to elect to treat it as personal estate.

H. F. F. Greenland for the respondents the residuary legatees of the personalty under the will of William Dickson the son. It is immaterial whether the disentailing deed of October 11, 1875, included the lands from which the moneys in Court arose. Sect. 1 of the Fines and Recoveries Act, 1833, defines "estate tail" as including a "base fee"; consequently s. 71 of that Act applies to these moneys whether in 1878 William Dickson the son was a tenant in tail thereof or a tenant entitled to a base fee therein.

Sect. 71 of the Fines and Recoveries Act, 1833, should be

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construed with regard to the law and practice prevailing before the passing of the Act. The Statute De Donis, which created entails, had no application to money or any other form of personal property: Co. Litt. 20 a; but in effect money could be entailed by creating a trust for its investment in the purchase of land to be settled in strict settlement. An entail was thus created in money because equity regarded that as done which ought to be done. As however fines and recoveries were in theory actions by a stranger for recovery of possession of freehold land, the method of suffering a recovery which resulted from *Taltarum's Case* (1) was not available to bar an entail in money to be invested in the purchase of land until the land had been purchased. This appears from the preamble to 39 & 40 Geo. 3, c. 56, which authorized the payment of entailed money to the persons entitled with certain consents without requiring the formality of investing it in land.

[WARRINGTON L.J. Under that Act the owner of the particular estate had to be one of the applicants.]

This Act was repealed by 7 Geo. 4, c. 45, which in effect enacted that on the petition of a tenant in tail with the concurrence of the person or persons, if any, whose concurrence would be necessary or sufficient to enable the tenant in tail to bar the estate tail and all remainders in the land to be purchased, the Court might order payment of the settled money to the petitioners if all persons entitled to interests or charges prior to the estate tail consented; if such persons or some of them did not consent the Court could only make a declaration that the estate tail and remainders were barred and that the land to be purchased when so purchased should be settled subject to the prior estates and interests to the use of the person who would have been entitled to the estate tail his heirs and assigns. This Act in the latter case clearly preserved the character of the money as being real estate.

The Fines and Recoveries Act, 1833, which by s. 70 repealed 7 Geo. 4, c. 45, substituted an assurance for an action; but it is submitted that a comparison of the language of s. 71

(1) Year Book, 12 Edw. 4, 19.

of this Act with that of 7 Geo. 4, c. 45, leads to the conclusion that an alteration of substance and not merely of form was intended.

By s. 15 of the Act absolute power is conferred on a tenant in tail to dispose of the entailed lands in fee simple or for a less estate saving the rights of persons entitled to interests prior to the estate tail. Sect. 19 gives a tenant in tail absolute power to enlarge a base fee. Sect. 40 prescribes the mode of disposition—namely, some one of the assurances (not being a will) by which a tenant in tail could have made a disposition if his estate were an estate at law in fee simple absolute. The form of such assurance in 1833 was, as regards freeholds in possession, a lease and release ; as regards remainders a deed of grant was sufficient. The only restriction on this absolute power of a tenant in tail is that under s. 34 of the Act, the consent of the protector is necessary to enable a tenant in tail to create any estate larger than a base fee, and this consent a protector has absolute discretion as to giving or refusing : s. 26.

Sect. 71 of the Act deals with the case of money subject to be invested in the purchase of land to be held in strict settlement, and directs that all the previous clauses of the Act are to apply as if freehold land had been actually purchased with such money. But the direction is made subject to an express exception which, it is submitted, as a question of construction, consists of two branches. The first branch is that the money, as to the person in whose favour or for whose benefit the disposition is to be made, shall be treated as personal estate ; the second branch is that the disposition is to be an assignment by deed inrolled. To treat these two branches as a single exception referring only to the form of assurance (as Mr. Hayes does) ignores the fact that the first branch applies in all cases, whereas the second does not apply to the case of bankruptcy—for which special provision is made by the section.

[WARRINGTON L.J. If you are right the obligation to invest in land is gone.]

The section only purports to deal with the interest of the

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person in whose favour the disposition is made. It does not affect the nature of the interest of persons entitled to estates prior to the estate tail or in remainder to or defeasance of that estate. The disposition would only affect the beneficial interest in the money as the legal interest therein remains in the trustees of the settlement. Money may, as regards the beneficial interests of different individuals therein, be of different characters. An example is the case of a devise of land in trust to sell and to hold the proceeds on trusts which wholly fail. In such a case the proceeds of sale descend to the heir at law as being real estate, but in his hands they are personal estate.

It is submitted that the effect of the section is, so far as regards the interest of the disponee, to make the money personal estate for all purposes: see Carson's Real Property Statutes, 2nd ed., p. 314, where the section is contrasted with s. 22, sub-s. 5, of the Settled Land Act, 1882.

Assuming that s. 71 deals only with the mode of assurance, the form of assurance itself would determine the nature of the interests created thereby. An assignment of real estate to a man, his executors, administrators and assigns could not create anything more than a life estate in the grantee in the absence of the word "heirs" or "in fee simple." A disposition of entailed money to the grantee, his executors, administrators and assigns has been held to be the correct form of assignment by Sargant J. in *In re Monckton's Settlement.* (1) The statement of s. 71 in Hayes' Introduction to Conveyancing, 5th ed., vol. i., pp. 204–6, emphasises the necessity of an "assignment" by printing the word in italics. It is submitted that in 1833 an "assignment" was wholly inappropriate to a disposition of property which was intended to retain the character of real estate.

The Act has been generally regarded as a masterpiece of skilful draftsmanship: *Bell* v. *Holtby* (2); Williams on Real Property, 18th ed., p. 96; and effect should be given to every word of s. 71.

The note in Hayes' Introduction to Conveyancing, 5th ed.,

(1) [1913] 2 Ch. 636, 646. (2) (1873) L. R. 15 Eq. 178, 189.

vol. ii., p. 187, on which the appellant relies is open to criticism in two respects: first, it omits all reference to the words in the section "as to the persons in whose favour and for whose benefit the disposition is to be made," and, secondly, it suggests the insertion of express words expressing the remainderman's election to take the money as personal estate. If the correct view be that the section deals only with the form of assurance it is difficult to see how an express election by the remainderman during the life of the protector could alter the character of the property.

If William the son had power to elect, it is submitted that the insertion in his will of a power of leasing and cutting timber between the devise of his real estate and the bequest of his personal estate shows that he intended the devise of real estate to comprise land in the strict sense and not moneys in Court which only notionally retained the character of land.

C. W. Turner for the respondents C. C. Forster Dickson and Goldsborough Dickson.

Clauson K.C. was not called upon to reply.

LORD STERNDALE M.R. This is an appeal from a decision of Russell J. on a petition claiming that certain funds in Court should be paid out to the petitioners. The effective petitioner is William Dickson and the other petitioners stand in the same interest. I think Russell J. was quite right in saying: "If the fund is to be treated as real estate to which his father was entitled at his death, the title of William Dickson is established. If not he fails to establish his title." The matter arises with respect to the wills of William Dickson the father and William Dickson the son and two disentailing deeds. These two deeds are set out in the judgment of Russell J. and it would therefore only be a useless expenditure of time if I were to repeat them. The learned judge decided that the petitioner was not entitled to the fund because it was not real estate but personal estate by virtue of s. 71 of the Fines and Recoveries Act, 1833. The meaning of that section in his opinion and mine is the important point to be decided. [His Lordship read the section and continued:] The section is

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long and rather complicated, but it was argued that if read intelligently its provisions would be seen to be accurate, and its meaning quite clear. I must confess, however, that the meaning is not absolutely clear to me. The real question is whether those words "save and except that in every case where under this clause a disposition shall be to be made of leasehold lands for years absolute or determinable, so circumstanced as aforesaid, or of money so circumstanced as aforesaid, such leasehold lands or money shall, as to the person in whose favour or for whose benefit the disposition is to be made, be treated as personal estate" provide that in all cases and for all purposes such money is to be treated as personal estate, or whether those words mean that for purposes of transfer or conveyance only it shall be so treated.

This was money arising from the sales of freehold lands under the Settled Estates Acts and it was held by Russell J. that it continued to have the character of land, and that, apart from s. 71 of the Fines and Recoveries Act, it would pass as real estate. He also held that William Dickson the son never elected that it should be held by him as personalty and therefore but for s. 71 it would continue to be land. I think that is right, and that he was never in a position to have the right to elect. By executing a disentailing assurance without the consent of the protector William Dickson the son created a base fee with regard to this money. But I think the provisions of the section apply to a base fee just as much as when an estate is disentailed with the consent of the protector.

There is no authority on the point. The only approach to an authority is a statement in Hayes' Introduction to Conveyancing published in 1840, 5th ed., vol. ii., p. 187, *n.* (175), where the author says: "The Act directs leaseholds for years, and money to be '*treated* as personal estate' (s. 71), but this direction has reference to the mode of assurance only; and it seems proper to express, in the assurance, the election of the tenant in tail to take the fund, whether consisting of freeholds, leaseholds for lives or for years, or money, according

to its *actual* character, and not according to its constructive equitable character. This precaution will exclude all questions between the real and personal representatives of the tenant in tail." Some exception was taken to the latter part of the note, on the ground that if the section deals only with the mode of assurance a remainderman has no right to elect at all so as to change the character of the money. Even if the note be wrong in the latter part of it, that does not show that it is wrong in the former part of it. Even if William Dickson the son had a right to elect I do not think that this disentailing assurance contains any indication of an election to hold the fund as personal estate, because when the document is looked at it will be seen that the word "heirs" as well as the words "executors and administrators" are used in the limitations.

The question, therefore, is whether this direction in s. 71 "has reference to the mode of assurance only" as stated by Mr. Hayes, or whether the property is personal estate for all purposes. Russell J. has held that the latter is the proper meaning of the section; but, in my opinion, the right construction is the one stated by Mr. Hayes in the passage I have read. The way in which the section runs on points to this construction: "the assurance by which the disposition of such leasehold lands or money shall be effected shall be an assignment by deed, which shall have no operation under this Act unless inrolled in His Majesty's High Court of Chancery within six calendar months after the execution thereof." I think the right way to read the section is as I have read it, and that it is not right to stop at the words "treated as personal estate" and say that that is one provision, and that the succeeding words form another provision. I think it should be read as one provision, for to read it otherwise would give rise to considerable anomalies, and would defeat the object of the Act, as expressed in its title. The title is "An Act for the Abolition of Fines and Recoveries, and for the Substitution for more simple Modes of Assurance." I do not think the title must be taken to indicate that there are no provisions in the Act which go beyond that, but the title shows

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that the Act is prima facie intended to deal with conveyancing forms only, and the title is worth consideration if there should be any ambiguity in the sections. As the section applies to a base fee as well as to an estate tail, the result of treating it as altering the character of the property would be that money liable to be invested in the purchase of land might be held up from being so invested so long as heritable issue of the tenant entitled to the base fee were in existence.

I think, therefore, that Russell J. put a wrong interpretation on the section and that the appeal should be allowed.

WARRINGTON L.J. I am of the same opinion. The question is whether a sum of money in Court representing the proceeds of sale of certain freeholds sold under the Leases and Sales of Settled Estates Act, 1856, are, in the events which have happened, to be treated for the purposes of the will of William Dickson the son as real or personal estate. If the fund is to be treated for the purpose of that will as real estate the petitioner is entitled, if it is to be treated as personal estate then the residuary legatees are entitled. The question turns practically entirely on the proper construction and effect of certain words in s. 71 of the Fines and Recoveries Act, and on the effect of a disposition by the tenant in tail of money liable to be laid out in the purchase of land to be settled within the meaning of the Act. The money arose from the sale of an estate at Tugal and Newton-by-the-Sea devised by the will of William Dickson the father. That land at the date of the sale stood limited in effect to the following uses: to the use of Patrick Thorp Dickson for life with remainder to his sons in tail male with remainder to uses which on construction have been held to be to the use of William Dickson the son in tail male. So the land stood settled at the date of the sale, unless the deed to which I am about to refer operated on it. That deed was a disentailing deed executed by William Dickson the son in the year 1875. I need not go through its provisions, as it is unnecessary to decide the question of its construction having regard to the construction I put upon s. 71. That deed purported to disentail the property but

was made without the consent of the protector and therefore only created a base fee. It only bound the issue in tail but did not destroy the remainders over. It was contended by the appellants that this deed had such a complete effect that the subsequent disentailing deed executed by William Dickson the son in the year 1878 upon which the present question turns had no effect on the money which arose from the sale, and that, as prior to the sale William Dickson the son had disentailed all the land in which he had an estate tail, s. 71 of the Act never came into operation. I will assume that the deed of 1878 did have effect and that the deed of 1875 did not extend to the land at Tugal and Newton-by-the-Sea.

The next thing which happened after the deed of 1875 was that on an application in the year 1877 under the Leases and Sales of Settled Estates Act, 1856, the lands at Tugal and Newton-by-the-Sea were directed to be sold and the proceeds of sale of William Dickson the father's one-third share were paid into Court.

Under s. 23 of the Leases and Sales of Settled Estates Act, 1856, it is provided that money to be received on such a sale is to be paid into Court and is to be applied (inter alia) in the purchase of other hereditaments to be settled in the same manner as the hereditaments in respect of which the money was paid. The moneys so paid into Court were therefore subject to be invested in the purchase of land to be settled, so that if lands were purchased out of the proceeds William Dickson the son would have an estate tail therein subject to the prior estates of Patrick Thorp Dickson and his issue male.

Then comes the deed of 1878 which it is said operated under s. 71 to convert the fund, so far as William Dickson the son is concerned, into personal estate. That deed recites shortly the will of William Dickson the father so far as relates to the Tugal and Newton-by-the-Sea estates, the sale of those estates under the Settled Estates Acts, and that William Dickson the son was desirous of barring his estate tail in all the hereditaments and purchase money thereby granted and assigned

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in order to acquire a base fee therein. The deed then witnesses that William Dickson the son grants and assigns to Charles Thorp his heirs, executors and administrators, first, certain unsold real estate and then all moneys which had been received or should be received from the sale of the estate at Tugal and Newton-by-the-Sea or from the sale of any of the said hereditaments thereby granted and also all the testator's house and lands at Belvedere, Alnwick, and, lastly, all other the lands, tenements and hereditaments, if any, and money to be invested in the purchase of lands, tenements and hereditaments to which the said William Dickson the son was or should be under or by virtue of the will of William Dickson the father entitled for an estate tail in remainder to hold the hereditaments moneys and premises so granted and assigned, subject nevertheless to the estates limited by the said will in priority to the estate tail of William Dickson the son, and subject also to the estates to take effect after the determination of such estate tail unto Charles Thorp and his heirs, executors and administrators to the use of William Dickson the son, his heirs, executors, administrators and assigns.

The deed is a bad piece of conveyancing, because it mixes up real and personal estate, and conveys both to the use of William Dickson the son "his heirs executors administrators and assigns." If there is anything in the point, that deed so far from indicating any desire on the part of William Dickson the son to treat the fund which had arisen or should arise from the sale as personalty appears to me to indicate the opposite view, in that it treats the personal estate as being merely incidental to the real estate. Whether that be right or wrong, it is plain that the deed did not express any election on the part of William Dickson the son to treat the fund as personal estate, and he could not elect in such a way as to have the fund paid to him, because the fund was not "at home" then, and, therefore, so far as election is concerned, I agree with the learned judge below.

I now come to s. 71, which is contained in the famous Act intituled: "An Act for the Abolition of Fines and

Recoveries, and for the Substitution of more simple Modes of Assurance." The Act, not only from its title, but from the general tenor of its provisions, was not directed to altering interests of persons entitled to estates tail, but only to altering the modes of assurance. It deals only with assurances and modes of assurance, unless s. 71 is an exception. It was said by the respondents, the residuary legatees, and their view was adopted by the learned judge, that a disposition under the section, whether of leaseholds or of money subject to be invested in the purchase of lands to be settled, of itself, without any further expression of intention, converts the leaseholds or the money into personal estate, and gets rid of the liability to be re-invested in land. It is said by the appellant that that is not so, but that all the section does is to deal with the mode of assurance. Up to s. 71 the Act has been dealing with lands settled upon limitations which involve an estate tail. Then s. 71 proceeds to deal with two things; lands directed to be sold, and money liable to be invested in the purchase of lands. [His Lordship read the first part of the section down to the words "as the lands to be purchased would, if purchased, have been actually subject to" and continued:] Pausing there, there is no difficulty; those freehold lands are to be treated as being settled in such a way that the person entitled would be treated as having an estate tail in them. If we were to stop there the effect of the Act would be to settle leaseholds to A. and the heirs of his body; but it is impossible to have an estate tail in leaseholds; and it is the same with regard to money. But the section goes on: "and all the previous clauses in this Act, so far as circumstances will admit, shall, in the case of lands to be sold as aforesaid being either freehold or leasehold, or of any other tenure, except copy of court roll, apply to such lands in the same manner as if the lands to be purchased with the money to arise from the sale thereof were directed to be freehold, and were actually purchased and settled; and shall, in the case of lands to be sold as aforesaid being held by copy of court roll, apply to such lands in the same manner as if the lands to be purchased with the money to

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arise from the sale thereof were directed to be copyhold, and were actually purchased and settled; and shall, in the case of money subject to be invested in the purchase of lands to be settled as aforesaid, apply to such money in the same manner as if such money were directed to be laid out in the purchase of freehold lands, and such lands were actually purchased and settled." Then comes the exception on which the question in the present case turns: "save and except that in every case where under this clause a disposition shall be to be made of leasehold lands for years absolute or determinable, so circumstanced as aforesaid, or of money so circumstanced as aforesaid, such leasehold lands or money shall, as to the person in whose favour or for whose benefit the disposition is to be made, be treated as personal estate, and, except in the case of bankruptcy, the assurance by which the disposition of such leasehold lands or money shall be effected shall be an assignment by deed, which shall have no operation under this Act unless inrolled in His Majesty's High Court of Chancery within six calendar months after the execution thereof; and in every case of bankruptcy the disposition of such leasehold lands or money shall be made by the Commissioner, and completed by inrolment in the same manner as hereinbefore required in regard to lands not held by copy of court roll." The words on which the question turns are that "money so circumstanced as aforesaid" shall "as to the person in whose favour or for whose benefit the disposition is to be made, be treated as personal estate." What is meant by "money so circumstanced as aforesaid?" I think it means the money referred to in the first part of the section, and applies to all money which, at the date of the disposition, is subject to be invested in the purchase of lands to be settled so that a person would have an estate tail therein.

Now to come back to the words "shall as to the person in whose favour or for whose benefit the disposition is to be made be treated as personal estate." Do these words mean that the money is personal estate for all purposes, or only to be treated as personal estate as regards the mode of assurance?"

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I think the expressions "shall be to be made" and "is to be made" point to the fact that a direction is being given as to form rather than effect. If the latter were intended the more natural expressions would have been "shall be made" and "is made" respectively. There is no authority upon the point except a statement in Hayes' Introduction to Conveyancing, 5th ed., vol. ii., p. 187. He there says distinctly that these provisions are intended to relate to modes of assurance only. *In re Monckton's Settlement* (1) was cited, where the section was referred to by Sargant J. without raising the present point, and he expressed no opinion upon it. As I understand his judgment he reads the section as prima facie having the meaning put upon it by Hayes—namely, that the money is to be treated for conveyancing purposes only as if it were personal estate, that is, not to treat it as personal estate for the purpose of considering what interest a person takes in it, but as personal estate so that an assignment of it without words of limitation would give an absolute interest in it. To go further would create extraordinary difficulties. Suppose A. B. were tenant for life and C. D. tenant in tail with remainders over, and C. D. made such a disposition as is contemplated by the Act. Is the fund to be treated in his hands as personal estate, when at any time it might be the duty of the trustees to invest it in the purchase of real estate? I think the reasonable interpretation of the section is the one we have adopted. Mr. Greenland in his argument has referred to the Act of 7 Geo. 4, c. 45, which authorized the payment of money subject to a trust for investment in land to a tenant in tail, but that is only if all the persons interested consented. The interpretation we are putting upon the section does not prevent any person absolutely entitled to the fund from getting it paid out to him. It seems to me therefore that there is no inconvenience arising from the construction we are putting on the section, but that serious difficulties would arise from the other construction suggested. I think, therefore, that the order of Russell J. must be set aside, and the appeal allowed.

(1) [1913] 2 Ch. 636.

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YOUNGER L.J. I am of the same opinion, and in view of the judgments delivered I can express my view in a few words. First of all, whether it is necessary to decide the point or not, I am clearly of opinion that the interest of William Dickson the son in the lands at Tugal and Newton-by-the-Sea was not touched by the disentailing deed of 1875. I agree that the first words of that assurance are wide enough to cover William Dickson the son's interest in those lands, but these words are clearly limited and controlled by the recitals, and, so controlled, do not extend to the reversionary interest of William Dickson either in the land in question or in the Hall at Alnwick in both of which a base fee is created and for the first time by the disentailing assurance of 1878. Moreover, while we have not heard Mr. Clauson on the point, and accordingly any expression of opinion is merely by the way, my own view, as at present advised, is in favour of Mr. Greenland's argument that even if the lands at Tugal were dealt with by the deed of 1875, yet having regard to the interpretation clause to the Fines and Recoveries Act, 1833, there remained in these lands a base fee in William Dickson the son which was in fact dealt with by the disentailing assurance of 1878.

In any case, we have, in these circumstances, only to consider what was the true effect of the assurance of 1878; was its true effect to convert the interest of the tenant in tail into an interest in personalty? It is not questioned that at the date of the execution of the deed the moneys in Court were not personalty: they were moneys "subject to be invested in the purchase of lands to be settled" within s. 71, so that the person entitled to the lands when purchased would have an estate tail therein; the moneys were moneys "so circumstanced" within the meaning of the exception to the section. Now, with reference to these moneys, the deed of 1878 on its inrolment became a disposition, permitted and authorized as a proper form of assurance by that exception. The only question accordingly is—whether the effect of the disposition so made and inrolled was to convert the interest thereby dealt with—one described in the earlier part

of the deed as an interest in freehold land—into an interest in personalty.

In my judgment the disposition had no such effect. The purpose of the exception is, I think, merely to prescribe the proper form of disposition for assuring a fund "so circumstanced." In my opinion it would be a straining of language to hold that the effect of the somewhat ambiguous words of the exception was to get rid of the previous provision of the section in which it is found that money so circumstanced was to be treated for all the purposes of the Act as the lands to be purchased thereout. It seems to me that the far more natural and reasonable purpose to attribute to the exception is the limited purpose only of prescribing a form of assurance appropriate to the subject matter of the assurance in its actual condition. That view is confirmed first by the provision that the deed shall be inrolled, which suggests that the character of what was land comprised in it shall not be lost, and, secondly, by the consideration that the assurance has to be effective according to its tenor whether the protector concurs in it or not.

In these circumstances the only safe course is to limit the provisions of the section in the way suggested in Hayes' Introduction to Conveyancing. I think therefore that the appeal ought to be allowed.

Appeal allowed.

Solicitors: *Warrens; Armitage, Chapple & Co.; Sharpe, Pritchard & Co.*

W. I. C.

ASTBURY J.

1921

May 26, 27; *June* 13, 14.

WESTWOOD *v.* HEYWOOD.

[1920. W. 2787.]

Easement—Water—Pipe Supply from Tenement S to Tenement D—Severance of Tenements—Conveyancing Act, 1881 (44 & 45 *Vict. c.* 41), *s.* 6—*Successive leases of D and S—Year to Year Tenancies—Implied Grant and Reservation—Extent—Rule in Thomas* v. *Owen—Conveyance of D to a Purchaser—Termination of D Tenancy—Subsequent conveyance of S to Lessee—Rule in Watts* v. *Kelson—Lessee's Interest to keep Yearly Tenancy alive—Intention—Merger.*

A former owner of two farms D and S laid a pipe conveying water from S, the quasi-servient tenement, to D, the quasi-dominant tenement.

In 1908 the then common owner let D to Webb on a year-to-year tenancy, and in 1911 he let S to the defendant on a similar tenancy. The tenancy agreements did not mention water rights:—

Held, that Webb's agreement passed the water right by implication and involved an implied reservation in the defendant's agreement.

Thomas v. *Owen* (1887) 20 Q. B. D. 225 applied.

In June, 1915, the owner conveyed D to the plaintiff. In September, 1915, Webb's tenancy expired. In October, 1915, the owner conveyed S to the defendant, whose tenancy was still on foot. Neither of these conveyances mentioned any water rights.

Held, that the implied reservation in the defendant's agreement was not confined to Webb's tenancy but enabled the owner to grant an immediate water right to the plaintiff without derogating from the defendant's agreement; and that this water right passed under the general words of the Conveyancing Act, 1881, s. 6.

Watts v. *Kelson* (1871) L. R. 6 Ch. 166 applied.

Quicke v. *Chapman* [1903] 1 Ch. 659 distinguished.

Held, also, that even if there had been no such implied reservation in the defendant's tenancy agreement, the implied grant of water right would have bound the S reversion subject to that agreement.

Cable v. *Bryant* [1908] 1 Ch. 259 applied.

Held, also, that in any case the defendant could no longer rely on his tenancy agreement, as he had shown an intention to acquire the fee in lieu of his tenancy, which was therefore merged.

Semble. A tenancy from year to year cannot be kept on foot in perpetuity by a tenant who acquires the fee.

WITNESS ACTION.

In 1888 Bramstone was the owner of Roxwell Farm and Elms Farm in Essex. Webb senior, father of the present Webb, was then tenant of Roxwell and sometime before 1892 Luckin became tenant of Elms.

There was a spring on Elms, the overflow from which

trickled or soaked down across the north slope of the Elms property and found its way into an open ditch. The ditch ran eastward across the Elms property and through the Roxwell property. It then turned south through the Roxwell property to an open ditch along a high road running east. The Roxwell farm buildings were south of this road. There was a holding-up tank on the Roxwell property in which the ditch water was stored for the use of the farm.

About 1892 Luckin constructed a filter bed at the spring and ran the water through a pipe to a hydraulic ram near the ditch so as to supply his house. The overflow from the ram went into the ditch, and as there was considerable waste, the diminution in the ditch water was inappreciable. The ram required a two-foot head to work it.

In 1905 Roxwell became a dairy farm and the sanitary authority objected to the open ditch water supply. Bramstone therefore, presumably with Luckin's permission, laid an underground iron pipe direct from the Elms filter bed to the Roxwell buildings. It left the filter bed at about the same level as the ram pipe and could be cut off by a stopcock at the same place. The stopcock was then controlled by the estate agent, who retained the key, which for convenience was usually hung up on a nail at the filter bed. From this time Roxwell enjoyed a practically continuous pipe supply, the overflow from the ram going into the ditch as before.

On January 20, 1908, Bramstone conveyed Roxwell and Elms to Shaw.

On September 29, 1908, Luckin gave up his tenancy of Elms and was compensated for his installation of the filter bed and ram as unexhausted improvements. The next tenant was Jacobsen, who held from September 29, 1908, to September 29, 1910, under a tenancy agreement dated May 10, 1909.

On September 29, 1910, the defendant became tenant of Elms for one year from September 29, 1910, and so on from year to year. His tenancy agreement with Shaw was dated January 16, 1911. Neither of these tenancy agreements

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contained any reservation of water rights either in favour of the landlord or of his other tenants.

In the meantime Webb, who had for many years been tenant of Roxwell in succession to his father, took a new yearly tenancy agreement from Shaw on September 23, 1908. This tenancy commenced on September 29, 1908, and was terminated on September 29, 1915. This agreement did not mention any water rights.

In June, 1914, Shaw agreed to sell Roxwell and Elms to Towler, who in October, 1914, before completion, agreed to sell Roxwell to the plaintiff.

The plaintiff made several requisitions and inquiries about the water right, but Towler's solicitors assured him that it would pass to him under the Conveyancing Act, 1881, s. 6, without any special words in the conveyance.

On June 14, 1915—i.e., three months before Webb's tenancy expired—Shaw with Towler's concurrence conveyed Roxwell to the plaintiff without any mention of water rights.

On July 31, 1915, Towler (again before completion) agreed to sell Elms to the defendant. In reply to the defendant's requisitions Towler's solicitors stated that they knew of no rights of way, water or other easements, but could not guarantee their absence.

On October 8, 1915, Shaw with Towler's concurrence conveyed Elms to the defendant without any reservation of water rights. The key of the stopcock was then handed to him by the estate agent.

Protracted discussions and negotiations between the plaintiff and defendant as to the water supply to Roxwell then ensued, but no arrangement was come to, and ultimately the defendant, who had throughout maintained that there was no easement, denied the plaintiff's right and threatened to cut off the water.

On October 13, 1920, the plaintiff commenced this action for a declaration that he was entitled to the supply as enjoyed at the date of his conveyance, and for an injunction restraining the defendant from interfering therewith.

A considerable part of the defendant's argument was

directed to the point that the stopcock was obviously put in to protect Luckin's ram, as otherwise he would not have consented to the Roxwell pipe. In other words he contended that the Roxwell supply was subservient to the ram supply and pro tanto precarious. This point failed on the evidence as to the actual control and use of the stopcock from 1905 to 1915, and the argument is therefore omitted.

Luxmoore K.C. and *Henry Johnston* for the plaintiff. At the date of the plaintiff's conveyance Roxwell enjoyed a continuous pipe supply from Elms. This passed by the conveyance of Roxwell: *Nicholas* v. *Chamberlain* (1); *Watts* v. *Kelson* (2); *Schwann* v. *Cotton*. (3)

The rule in *Watts* v. *Kelson* (2) holds, although the tenements are in lease at the date of the grant, subject of course to the fact that the grantor cannot interfere with the rights of existing tenants during their tenancies: *Coutts* v. *Gorham* (4); *Davies* v. *Marshall* (5); *Cable* v. *Bryant* (6); Gale on Easements, 9th ed., p. 124.

Now what were the tenant's rights in this case? Webb's lease of Roxwell in 1908 obviously included the water right by implication. The defendant's subsequent lease of Elms in 1911 must therefore be read with an implied reservation of that right: *Thomas* v. *Owen* (7); and there was no derogation in the plaintiff's conveyance.

Even if the defendant's lease were not subject to any such reservation he could not now rely on it, as it is merged in his fee.

Actual enjoyment, albeit permissive or precarious, though not sufficient for prescription: *Burrows* v. *Lang* (8), is sufficient to pass an easement by implied grant or under the Conveyancing Act, 1881, s. 6: *International Tea Stores Co.* v. *Hobbs*. (9)

Micklem K.C. and *Lavington* for the defendant. In

(1) (1606) Cro. Jac. 121.
(2) L. R. 6 Ch. 166.
(3) [1916] 2 Ch. 120, 459.
(4) (1829) Moo. & M. 396.
(5) (1861) 1 Dr. & Sm. 557, 563.
(6) [1908] 1 Ch. 259.
(7) 20 Q. B. D. 225, 230, 231.
(8) [1901] 2 Ch. 502.
(9) [1903] 2 Ch. 165, 171.

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Thomas v. *Owen* (1), in which *Coutts* v. *Gorham* (2) was not cited, the question was only between two tenants. The quasi-dominant tenant was entitled to an actual easement over the quasi-servient tenement, so that the owner could not lease the quasi-servient tenement in derogation of the quasi-dominant tenant's rights during his tenancy or (according to that authority) during any subsequent extension thereof.

Assuming however that there was a so-called implied reservation (3) in the defendant's lease, it was only based on non-derogation. It was therefore confined to Webb's tenancy: *Coutts* v. *Gorham* (2), and did not enure in the plaintiff's favour. (4) Now Webb's tenancy came to an end on September 29, 1915. From that moment, if not before, the defendant's lease was free of any water right, and the grantor could not impose one on him.

In *Watts* v. *Kelson* (5) the supply was continuous without any controlling stopcock and the grantor was in occupation. In the present case the grantor could no doubt by express words have granted an easement in futuro on the termination of the defendant's lease. But that is not effected by the general words of the Conveyancing Act, 1881, s. 6, which only pass what the grantor had *then* power to grant: *Quicke* v. *Chapman* (6); and only pass rights actually enjoyed in circumstances leading to an expectation of their continuance: *Birmingham Banking Co.* v. *Ross.* (7) The plaintiff merely relied on the assurance of Towler's solicitors.

In *International Tea Stores Co.* v. *Hobbs* (8) the defendant grantor was throughout in occupation of the quasi-servient tenement. In *Coutts* v. *Gorham* (2) the quasi-servient tenancy was merged by operation of law, and in *Davies* v. *Marshall* (9) and *Cable* v. *Bryant* (10) by actual surrender. In none of these four cases were there any tenant rights to be considered.

(1) 20 Q. B. D. 225, 230, 231.
(2) Moo. & M. 396.
(3) See *Gordon* v. *Ogilvie* (1899) 15 Times L. R. 239, 240*b*.
(4) See *Derry* v. *Sanders* [1919] 1 K. B. 223, 235.
(5) L. R. 6 Ch. 166.
(6) [1903] 1 Ch. 659, 666.
(7) (1888) 38 Ch. D. 295, 307.
(8) [1903] 2 Ch. 165, 171.
(9) 1 Dr. & Sm. 557, 563.
(10) [1908] 1 Ch. 259.

In the present case there is no surrender of the defendant's tenancy, and since the Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25, sub-s. 4, the question of merger apart from direct evidence of intention depends upon the interest of the person in whom the two estates coalesce: *Ingle* v. *Vaughan Jenkins*. (1) Here it was obviously to the defendant's interest to keep his tenancy alive.

[ASTBURY J. Can a year-to-year tenancy be kept alive when the tenant purchases the fee?]

Certainly. There could have been a declaration against merger in the conveyance, or the fee could have been conveyed to a trustee. But since the Judicature Act these conveyancing expedients, though advisable, are unnecessary if the interest against merger is obvious: *In re Fletcher*. (2)

A tenancy from year to year is not based on any implied periodic reletting. It is a springing interest arising out of the first contract and parcel of it, and there is not in contemplation of law a recommencing or reletting at the beginning of each year: *Gandy* v. *Jubber* (3); Redman on Landlord and Tenant, 7th ed., p. 315.

Luxmoore K.C. in reply. The implied reservation in *Thomas* v. *Owen* (4) was not limited to the duration of the quasi-dominant tenancy, or any extension of that tenancy. It was a complete reservation. The owner could obviously have demised the farm with the right of way to the quasi-dominant tenant for 999 years, instead of a shorter term, and the same principle would have applied to a conveyance in fee to that tenant or any other person.

In *Quicke* v. *Chapman* (5) the grantor had only a builder's right of entry over the adjoining land and could therefore create no easement.

As to the merger point. A fixed term is definitely carved out of the fee once for all and can no doubt be kept alive after the relation of landlord and tenant ceases. But there is no authority that a mere springing interest can be so kept

(1) [1900] 2 Ch. 368.
(2) [1917] 1 Ch. 147, 339.
(3) (1865) 9 B. & S. 15, 18.
(4) 20 Q. B. D. 225, 230, 231.
(5) [1903] 1 Ch. 659, 666.

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alive. Surely the non-merger, if any, must be limited to that part of the yearly tenancy to which the tenant has become entitled as a term certain, and any further springing interest must cease. In any case the point is an afterthought, as the defendant obviously intended to take the fee in lieu of his tenancy, and not to hold both in perpetuity.

ASTBURY J. [after stating the facts]. The plaintiff contends that at the time Roxwell was conveyed to him it was in the enjoyment of a formed and regular piped water supply the right to which passed to him under the Conveyancing Act, 1881, s. 6.

The defendant has raised several interesting and difficult points. He contends that before 1905, when the Roxwell pipe was put in, Luckin was in sole possession and control of the spring, he having put in the filter bed and ram and there being no reservation of any rights in favour of any other person. He contends that the Roxwell pipe must have been laid with Luckin's consent; that the stopcock was obviously put in for his protection; that its presence made the water supply precarious on the will of the person who controlled it; that as it was on Luckin's field it could not be used without his consent; and that the proper inference is that the Roxwell supply was subject to prior rights then existing and recognized in favour of the Elms tenants.

Before dealing with these points it is necessary to refer shortly to the circumstances in which the plaintiff and defendant purchased. [His Lordship then read the respective requisitions and replies and continued:] There is not the slightest doubt that the plaintiff purchased Roxwell with the existing water supply, in the belief and with the assurance of Towler's solicitors that it would pass to him by the conveyance. The defendant on the other hand, being assured by the same people that they were not aware of any easement affecting Elms, took his conveyance in the belief that it was made to him free from any reservation, easement or restriction of this character.

The defendant contends that the plaintiff really relied

only on the assurance of Towler's solicitors and did not obtain in fact any grant of this water supply. He also relies on the fact that before and at the date of the plaintiff's conveyance, the defendant was in possession of Elms including the spring under his 1911 tenancy agreement without any reservation in favour of Roxwell.

In answer to the latter point the plaintiff relies on the fact that Webb was for many years before 1905 tenant of Roxwell and took a new yearly tenancy agreement from Shaw on September 23, 1908, under which he in fact held until after the plaintiffs conveyance. He contends that this tenancy agreement gave Webb an implied water right, which must have been reserved by implication in the defendant's subsequent tenancy agreement, and that this right passed to the plaintiff.

The plaintiff relies upon the rule in *Watts* v. *Kelson* (1) and contends that his conveyance, coupled with s. 6 of the Conveyancing Act, 1881, assured to him the right to the water supply then de facto used and enjoyed by Roxwell.

In answer to this the defendant sets up his 1911 tenancy agreement and relies on *Quicke* v. *Chapman* (2) which establishes the rule propounded by Joyce J. in *Godwin* v. *Schweppes* (3) that "general words in a grant are to be restricted in equity as well as at law to that which the grantor had then power to grant." He contends that in 1915, having already leased the unrestricted right in this spring to the defendant, Shaw had no right to convey this water easement expressly or by implication to the plaintiff.

The defendant also contends that the existence of the stopcock and the circumstances in which the ram was put in by Luckin, the former tenant of Elms, raise an inference that the easement was precarious.

Now it is quite clear that until the present dispute the Roxwell tenants had enjoyed a water supply through this pipe without interruption since 1905, and that before that date

(1) L. R. 6 Ch. 166. (2) [1903] 1 Ch. 659, 666.
(3) [1902] 1 Ch. 926, 933.

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they enjoyed apparently without any appreciable interruption the flow of water from this spring down the open ditch. Webb says that on the complaint of the sanitary authority in 1905 Bramstone the common owner laid the pipe, although Luckin was tenant in possession of Elms, including the field in which the spring is situated, and that he has never known any stoppage or interruption of this water supply apart from that caused by dry weather. Shaw's estate agent says that the key of the stopcock was always kept by him and was under his control, and not under the control of the Elms tenant; that he has cut off the water on certain occasions, principally in the interests of Roxwell, e.g., to get rid of airlocks in the Roxwell pipe, but that it was also used to clean the filter bed and occasionally to help the ram. Whether it was used to help the ram at any other time than when used for the convenience of Roxwell I do not know, but its use for any purpose necessarily raised the head of water, and pro tanto helped the ram. The result of the estate agent's evidence is that in his time the stopcock was used certainly as much for the convenience and benefit of Roxwell as for Elms, if it was used for the latter at all. It is impossible to draw the inference that it was put in solely for the benefit of the Elms ram. It was never put in until the Roxwell tenant, owing to the sanitary authority's complaint, insisted on his water supply being made right. It was put in the Roxwell pipe as part of the work done for the benefit of Roxwell. Its presence does not therefore enable me to draw any inference in the defendant's favour, nor do I think it is really material to the point upon which this case must really be decided.

The defendant next relies upon the rule in *Quicke* v. *Chapman* (1), but I am not satisfied that in 1915 the owner was in any way prevented or restricted in his right to grant this water supply to the purchaser of Roxwell. In the first place, when the lease of Elms from year to year was granted in 1911 to the defendant, the owner had previously granted a similar lease of Roxwell to

(1) [1903] 1 Ch. 659, 666.

Webb the sitting tenant which, in my judgment, carried the right to the enjoyment of this water. Therefore under the rule in *Thomas* v. *Owen* (1), the defendant's subsequent tenancy agreement of 1911 must be read with an implied reservation of this right of water previously granted and assured to the Roxwell tenants. If I am right on this point, the case is at an end, because there was nothing at the date of the plaintiff's conveyance to prevent the owner granting the full benefit of the existing water supply then enjoyed with Roxwell, and the case clearly falls within *Watts* v. *Kelson* (2), and authorities of that character.

Another point has been argued which I only notice because of its interest. Assuming that the defendant as tenant from year to year under his 1911 tenancy agreement was, contrary to my opinion, entitled to interfere with this water supply, the plaintiff still contends that the rule in *Quicke* v. *Chapman* (3) has no application, but that on the contrary the rule in *Watts* v. *Kelson* (2) still applies although the quasi servient and dominant tenements were in lease at the date of the grant. He relies upon *Coutts* v. *Gorham* (4), referred to in extenso in Gale on Easements, 9th ed., p. 124; *Davies* v. *Marshall* (5); and *Cable* v. *Bryant.* (6) I am not going to spend any time on this point, because I have already decided the case under the *Thomas* v. *Owen* (1) rule. It is however plain from those authorities that the fact that Elms was in lease at the date of the Roxwell grant did not entitle the grantor subsequently to pass any interest in the Elms reversion to the defendant or any other person in derogation of the Roxwell grantee's rights enforceable against the Elms reversion when it fell into possession.

The defendant distinguishes these authorities on the ground that in *Coutts* v. *Gorham* (4) there was a surrender by operation of law, and in the other two cases there was an actual surrender of the leasehold interest, whereas in the present case, the defendant was tenant from year to year

(1) 20 Q. B. D. 225, 230, 231.
(2) L. R. 6 Ch. 166.
(3) [1903] 1 Ch. 659, 666.
(4) Moo. & M. 396.
(5) 1 Dr. & Sm. 557, 563.
(6) [1908] 1 Ch. 259.

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at the date of his conveyance. He therefore contends that *Coutts* v. *Gorham* (1) does not apply, because since the Judicature Act his equitable right to keep his yearly tenancy on foot, notwithstanding the merger at law, must now prevail. Without any hesitation he puts forward the startling proposition that when he took his conveyance in fee he was entitled in equity to keep his yearly tenancy on foot, I suppose, in perpetuity, on the ground that that yearly tenancy was more to his benefit than the fee which, being granted in derogation of the plaintiff's prior right to water, is no protection against that right.

The merger rule relied upon is conveniently referred to by Farwell J. in *Ingle* v. *Vaughan Jenkins* (2), where he approves of the proposition in Lewin upon Trusts, 10th ed., p. 889 ; 12th ed., p. 936, which is as follows : "The principle by which the Court is guided is the *intention ;* and in the absence of express intention, either in the instrument or by parol, the Court looks to the *benefit of the person in whom the two estates become vested.*" It is quite true as Farwell J. points out that the rule is not confined to the merger of charges but extends to the merger of leases ; but whether it has any application to the present case I should think extremely doubtful.

Assuming that the *Thomas* v. *Owen* (3) rule upon which I decide this case were out of the way, I am not disposed to hold that in the circumstances of the present case the defendant can rely on any equitable non-merger of his yearly tenancy. He contends that after acquiring the fee in Elms he is still entitled in equity to rely on his yearly tenancy as a protection against the Roxwell water right by which his fee is plainly bound. I doubt whether there is any continuing relationship of landlord and tenant in equity any more than at law in this particular case. Further, having regard to the circumstances preceding the defendant's conveyance, I think he expressly intended to acquire the fee in lieu of his tenancy and relied upon the representation

(1) Moo. & M. 396. (2) [1900] 2 Ch. 368, 370.
(3) 20 Q. B. D. 225, 230, 231.

of Towler's solicitors, that they were unaware of any easements affecting it. His tenancy was therefore merged.

For these reasons the plaintiff succeeds and there must be judgment for him with costs. The declaration and injunction will go accordingly.

Solicitors: *Sweetland & Greenhill; W. Hilliard & Ward.*

G. R. A.

EVE J.
1921
April 22; *May* 6, 13.

In re SALTER AND AWDRY'S LEASE.

PROPERTY AND ESTATES COMPANY, LIMITED *v.* BLUNT.

[1921. S. 1460.]

Landlord and Tenant—Lease—Tithe Rate—Lessee's Covenant to pay Rates, etc. —"Tithe rentcharge (if any) only excepted"—Property in City of London— 22 *&* 23 *Car.* 2, *c.* 15—44 *Geo.* 3, *c.* lxxxix., *s.* 11—*Tithe Act,* 1836 (6 *&* 7 *Will.* 4, *c.* 71), *s.* 67—*London (City) Tithes Act,* 1879 (42 *&* 43 *Vict. c. clxxvi.*), *ss.* 3, 12—*Tithe Act,* 1891 (54 *Vict. c.* 8), *ss.* 8, 9, 12.

By a lease made in 1894 land and two houses erected thereon in the City of London were demised to lessees for a term of ninety-nine years at a rent of 480*l.* payable without any deduction except for "tithe rent charge (if any) and landlord's property tax." In pursuance of Acts of 22 & 23 Car. 2, c. 15, and 44 Geo. 3, c. lxxxix., a tithe rate of 11*l.* 9*s.* 3*d.* was assessed upon the demised premises and was recoverable by distress according to those Acts. The present lessees by assignment of the residue of the term claimed as against the freeholder to deduct this amount from their rent under the terms of the lease:—

Held, that the definition of "tithe rent charge" in the Tithe Act, 1891, was inapplicable to any payment within the City of London; and further, that this tithe rate, having regard to its origin and nature, was in no sense a rent issuing out of land but a rate assessed by virtue of ownership which the lessees could not deduct from their rent under the terms of this lease.

ADJOURNED SUMMONS.

By a lease dated July 19, 1894, certain land and two messuages erected thereon, Nos. 36 and 37 Queen Street, in the City of London, were demised by the beneficial owners thereof to the predecessors in title of the plaintiffs

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for a term of ninety-nine years from December, 1892, at a yearly rent of 480*l.*, such rent to be paid "without any deduction except for tithe rentcharge (if any) and landlord's property tax" during the continuance of the term.

The lessee covenanted to pay the yearly rent without any deduction except as aforesaid and also to pay all rates, taxes, charges, assessments and outgoings whatsoever "the tithe rent charge (if any) and landlord's property tax" only excepted. On March 25, 1895, the hereditaments and premises comprised in the lease were assigned to the Edison and Swan Electric Light Co., Ld., for the residue of the term. It appeared from inquiries made from the collector of tithe rate that since 1895 this tithe rate was paid by the Edison and Swan Co. and that before this date it was paid by the freeholder.

By an indenture of assignment dated May 10, 1920, these premises were assigned by the Edison Swan Co. to the plaintiffs for all the residue of the term and subject to the covenants contained in the lease of July 19, 1894. The defendants were entitled to the reversion of the demised premises expectant upon the term granted.

By an Act of 22 & 23 Car. 2, c. 15, a sum was fixed as the annual tithes for certain parishes in the City of London burnt by the great fire of 1666 to secure the maintenance of the parsons, etc., in such parishes; and by an Act of 44 Geo. 3, c. lxxxix., the sums fixed by the Act of Charles II. were increased, and provisions for recovering the same by distress were re-enacted. The relevant provisions of the Act of Charles II. and of the London (City) Tithes Act, 1879 (42 & 43 Vict. c. clxxvi.), sufficiently appear in the considered judgment of the Court. The sum payable in the parishes of St. Michael Royal and St. Martin Vintry in which the premises demised by the lease were situated was 233*l.* 6*s.* 8*d.* On May 29, 1920, the plaintiffs received a demand for 11*l.* 9*s.* 3*d.*, being the proportion of the 233*l.* 6*s.* 8*d.* assessed and charged upon the premises for the period May, 1919, to May, 1920. The plaintiffs claimed to deduct this sum and all future payments of this tithe rate from

the rent payable to the defendants under the lease. The defendants contended that it must be borne by the plaintiffs. Thereupon the plaintiffs issued a summons to have the question decided whether according to the true construction of the lease the tithes or sums of money in lieu of tithes assessed and charged upon the premises under 44 Geo. 3, c. lxxxix., were payable by the plaintiffs or by the defendants.

Chetwynd Leech for the plaintiffs. This tithe rate though not strictly a legal rentcharge charged upon land is a payment in the nature of a tithe rentcharge and payable by the freeholder under the terms of the lease. It is recoverable under the Acts by distress on the premises demised. I rely upon the provisions of the London (City) Tithes Act, 1879 (42 & 43 Vict. c. clxxvi.), ss. 3 and 12. The parties clearly contemplated that some deduction would be made, if not of an actual rentcharge then for something of a similar nature, otherwise the provision in the lease would be meaningless, as they must be taken to have known that the Tithe Act of 1836 did not apply to the City of London. Sect. 11 of the Act of 44 Geo. 3 gave a power of distress to enforce the assessments made on the premises and goods of the occupier or owner. It was not called a tithe rentcharge but in its nature the payment is not distinguishable from a tithe rentcharge: *Bailey* v. *Badham.* (1) Upon the true construction of this lease this rate should be deducted annually by the lessees.

Harman for the defendant. This payment is in no sense a tithe rentcharge which is charged upon real property; it is a personal assessment under the Act by virtue of the ownership of the houses. The term "tithe rentcharge" had acquired a statutory meaning under the Tithe Act of 1891, ss. 8, 9, before the date of this lease. The words must be construed strictly. I rely upon the words "if any" in the lease after the words "tithe rentcharge." They may have been inserted out of abundant caution, or the tithe rentcharge might have been redeemed. I rely also

(1) (1885) 30 Ch. D. 84.

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upon the Tithe Act, 1836. This is not a payment in lieu of tithe: *Esdaile* v. *Payne* (1); *Payne* v. *Esdaile* (2); Key and Elphinstone, Precedents in Conveyancing, 10th ed., vol. 1, pp. 848, 971; Prideaux, Precedents in Conveyancing, 20th ed., vol. 1, 179.

Chetwynd Leech, in reply, referred to *Esdaile* v. *Assessment Committee of City of London Union.* (3) A sensible meaning must be put upon the provision in the lease. By the Act of 1879 it is to be deemed to be a rentcharge.

Cur. adv. vult.

May 13. EVE J. delivered the following written judgment: The question in this case is whether the plaintiffs as lessees of two messuages in the City of London held under a lease dated in July, 1894, for the residue of a term of ninety-nine years from December, 1892, at an annual rent of 480*l.* payable without any deduction, except for tithe rentcharge (if any) and landlord's property tax, are entitled to deduct from the rent sums amounting to between 11*l.* and 12*l.* per annum assessed upon them as a tithe rate in respect of the demised premises.

By the lease the lessees are bound to pay and discharge all rates, taxes, charges, assessments and outgoings whatsoever, whether Parliamentary, parochial, local, or of any other description, assessed, charged, or imposed upon the demised premises or the owner or occupier in respect thereof, except the tithe rentcharge (if any) and the landlord's property tax. If therefore the lessees are to impose on the landlords liability for the sums I have mentioned they must establish that the payments fall within the meaning of the expression "tithe rentcharge" in the lease. By s. 9, sub-s. 2, of the Tithe Act, 1891 (54 Vict. c. 8), this expression means "tithe rentcharge issuing out of lands and payable in pursuance of the Tithe Acts," that is to say, the Commutation Act of 1836, and the enactments amending the same passed before the Act of 1891: see s. 12, sub-s. 3,

(1) (1885) 52 L. T. 530, 535. (2) (1888) 13 App. Cas. 613.
(3) (1887) 19 Q. B. D. 431, 440.

of the Act of 1891. But the Tithe Acts did not extend to any payment instead of tithes arising or growing due within the City of London, and the definition of tithe rentcharge in the Act of 1891 is therefore inapplicable to and cannot, in my opinion, be regarded as including any payment within the City.

The point at issue cannot, I think, be disposed of on the short ground that the expression "tithe rentcharge" had acquired a statutory meaning at the date of the lease, and that the payment in question does not come within that meaning. So to hold would be to impute to the contracting parties an intention to except from the operation of the lessee's covenant something which they must be taken to have known never could have been included within it. In my opinion the right course to adopt is to ascertain first what is the nature of the payment in dispute and then to determine whether it can properly be held to be a rentcharge.

The payment originated under an Act passed in the twenty-second and twenty-third years of the reign of Charles 2, c. 15, for the better settlement of the maintenance of the parsons, vicars, and curates in the parishes of the City of London burnt by the great fire in 1666. By that Act a certain sum was fixed as the annual tithes of each of the said parishes, and in order that the same might be more equally assessed upon the several houses, buildings, and all other hereditaments whatsoever within the parish a body of persons was appointed proportionably to assess upon all houses, shops, warehouses and cellars, wharves, quays, cranes, waterhouses, and tofts of ground remaining unbuilt, and all other hereditaments whatsoever (except parsonages and vicarage houses) the whole sum by the Act appointed in the most equal way that the assessors according to the best of their judgments could make it. And it was enacted that the sums so assessed and taxed should be paid to the respective parsons, vicars and curates, and their successors at the times and places therein mentioned; and finally by s. 11 it was further enacted that if any inhabitant

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should refuse or neglect to pay to the incumbent any sum or sums of money payable or by that Act appointed to be paid to him it should be lawful for the Lord Mayor of the City of London for the time being to give and grant out warrants for the officer or person appointed to collect the same, with the assistance of a constable, to levy the same tithes or sums of money so due and in arrear and unpaid by distress and sale of the goods of the party or parties so refusing or neglecting to pay, returning to the owner or owners the overplus of such goods over and above the said arrears and the reasonable charges of making such distress. By a subsequent Act (44 Geo. 3, c. lxxxix.) the certain sums fixed by the earlier Act were increased and the provisions for assessing and recovering the same were in substance re-enacted. By s. 12 of the London (City) Tithes Act, 1879, it is provided that the provisions of the Tithe Acts and of that Act with respect to the redemption of rentcharges charged on land in lieu of tithes shall extend and apply "to the redemption of all rates, assessments and yearly or other payments payable in respect of property in certain parishes under the last two Acts in lieu of tithes for the raising and paying of the certain annual maintenance of parsons, vicars, and curates as though such rates, assessments and payments were apportioned rentcharges."

Such is the nature of the payment, and in my opinion it is impossible to hold it to be a rentcharge. True it is that it is recoverable by distress on the premises assessed, and so far as the persons liable to pay are concerned there may be little distinction in these respects between such a charge and one charged upon the premises but it is in no sense a rent issuing out of land; it is a rate assessed by virtue of ownership. In these circumstances it cannot, in my opinion, properly be included in the expression "tithe rentcharge" in this lease, and the claim of the lessees to deduct it from their rent cannot be sustained.

It does not follow from this conclusion that the exception is meaningless and inoperative. It may well be that there do exist within the City obligations which would fall within

it, but this is a point upon which I have no sufficient information to enable me to express an opinion. The lease has been framed in such manner as to except these obligations, if any, and all I have decided is that the particular obligation dealt with by the summons is not included in the exception.

The lessees must pay the costs of the summons.

Solicitors; *Oldfields; Routh, Stacey & Castle, for Thring, Sheldon & Ingram, Bath.*

G. M.

In re CUBAN LAND AND DEVELOPMENT COMPANY (1911), LIMITED.

[No. 0087 of 1921.]

Company—Debenture Stock—Redeemable on Six Months' Notice by Company—Right to share in Surplus Assets—Clog on Equity of Redemption—Collateral Advantage—Validity.

A private company in 1912 created an issue of 20,000*l.* 6 per cent. debenture stock secured by a deed poll dated June 12, 1912, which gave the debenture holders a right in a winding up to 50 per cent. of the surplus assets. This debenture stock, of which 15,950*l.* was issued, could be paid off at any time by the company on six months' notice. In 1913 the debenture stockholders by extraordinary resolutions sanctioned the issue in priority to the existing debenture stock of 20,000*l.* perpetual Prior Lien Debenture Stock, carrying 6 per cent. interest payable out of profits only and the right to one-third of the surplus assets in a winding up; and they resolved that the interest on the 6 per cent. debenture stock should only be payable out of profits, and that they should be entitled only to one-third of the surplus assets in a winding up. 10,000*l.* Prior Lien Debenture Stock were issued accordingly. In April, 1920, the company sold its principal asset, and out of the purchase money paid off the two debenture stocks. In October, 1920, it was resolved by special resolution that the company should be voluntarily wound up:—

Held, as to both debenture stocks, that the holders were entitled to share in the surplus assets, as there was nothing in the bargains inconsistent with or repugnant to the right of redemption.

P. O. LAWRENCE J.

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Kreglinger v. *New Patagonia Meat and Cold Storage Co.* [1914] A. C. 25 applied.

Noakes & Co. v. *Rice* [1902] A. C. 24 distinguished.

SUMMONS.

In 1911 the above-named company was incorporated as a private company with a capital of 33,000*l.* divided into 33,000 shares of 1*l.* each, of which 32,753 were issued and fully paid up.

In 1912 the company created an issue of 20,000*l.* debenture stock secured by deed poll dated June 12, 1912, under which the debenture stock was to bear interest at 6 per cent. per annum from December 1, 1913, and in addition to carry the right to 50 per cent. of the net profits of the company for distribution as dividend "and on a winding up (after payment in full of the debenture stock . . . . and the share capital of the company) 50 per cent. of the surplus assets." The debenture stock was made repayable upon six months' notice in writing by the company. 15,950*l.* of this debenture stock was issued by the company.

On November 11, 1913, a meeting of debenture stock holders was held, at which extraordinary resolutions were passed sanctioning the creation in priority to the existing debenture stock of not exceeding 20,000*l.* Prior Lien Debenture Stock carrying 6 per cent. interest payable only out of the net profits of the company, and to be non-cumulative until interest had been paid in full for three years. It was also provided that no interest was to be paid on the existing debenture stock until the net profits should suffice in any one year to provide for the interest after payment of interest on the Prior Lien Debenture Stock. It was further resolved (resolution 4) that "in lieu of the debenture stock carrying the right to 50 per cent. of the net profits . . . . and on a winding up (after payment in full of the debenture stock for the time being outstanding and of the share capital of the company as provided by the terms of the issue thereof) to 50 per cent. of the surplus assets, the balance of such net profits and in the case of winding up any surplus assets shall, after the redemption in full of the Prior Lien Debenture Stock

and the 6 per cent. debenture stock, be payable as to one third to the Prior Lien Debenture stockholders, as to another third to the 6 per cent. debenture stockholders, and as to the remaining third to the company."

10,000*l.* perpetual Prior Lien Debenture Stock were accordingly issued by the company upon which the sum of 9,000*l.* was actually paid up. No interest ever became due in respect of either the Prior Lien or 6 per cent. debenture stock.

In February, 1920, the company entered into a contract for the sale of its principal asset, and upon receipt of the purchase price issued on April 16, 1920, a circular letter to the holders of Prior Lien and 6 per cent. debenture stock intimating that the company were prepared to repay the principal sums owing. The letter continued: "As interest is only payable out of profits, which have not been made, there is no object in deferring the repayment until the lapse of the usual six months' notice, and, therefore, if you will present your debenture stock certificate at this office on or after the 19th day of April next, a note of the repayment will be endorsed thereon and a cheque for the principal owing to you . . . . will be handed to you, together with your debenture stock certificate. . . . . On counsel's advice, the Board are taking the decision of the Court as to the division of the balance of funds, which will eventually remain at the company's disposal. . . . ." On April 22, 1920, Astbury J. made an order upon an originating summons intituled *In re Cuban Land and Development Co.* (1911), *Ld. The Company* v. *Hoghton* [1920] C. 616, declaring that upon the construction of the resolution set out above surplus assets in the winding up of the company available for distribution after payment in full of all the liabilities whether secured or unsecured of the company, and the costs of the winding up ought to be divided in equal third parts amongst (1.) the holders of the Prior Lien Debenture Stock, (2.) the holders of the 6 per cent. debenture stock, and (3.) the shareholders, without paying off the share capital of the company before such division.

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By a special resolution passed and confirmed at extraordinary general meetings held on October 12, 1920, and October 28, 1920, respectively, the company went into voluntary winding up. Before this time the principal moneys owing on both the Prior Lien Debenture stockholders and 6 per cent. debenture stockholders had been paid.

The present summons was taken out by the liquidator of the company, to have it determined whether the Prior Lien and 6 per cent. debenture stockholders were entitled to participate to any and what extent in the surplus assets of the company.

J. B. Lindon for the liquidator.

H. E. Wright for a shareholder. In the case of both debenture stocks a right to share in the surplus assets is repugnant to the right of redemption, and constitutes a clog. The case in reference to the 6 per cent. debenture stock is the stronger because that stock was payable off upon six months' notice in writing. It is repugnant to that right to redeem that these debenture stockholders should remain entitled to a benefit in a subsequent winding up: *Kreglinger* v. *New Patagonia Meat and Cold Storage Co.* (1); *Noakes & Co* v. *Rice.* (2)

Spens for debenture stockholders. The provision for payment to the debenture stockholders of shares in surplus assets is not a clog or repugnant to the contractual right to redeem: compare *Kreglinger* v. *New Patagonia Meat and Cold Storage Co.* (1), where the payment of a commission after redemption was held to be valid. *Noakes & Co.* v. *Rice* (2) is distinguishable. In that case there was a contractual right to an immediate reconveyance on payment of principal and interest, which was inconsistent with a continuing tie.

June 7. P. O. LAWRENCE J. delivered the following written judgment: The principles governing the deter-

(1) [1914] A. C. 25, 61. (2) [1902] A. C. 24.

mination of the questions arising on this application are fully expounded by Lord Parker in his speech in the *New Patagonia Meat Co.'s Case* (1), and I need not repeat them on this occasion.

Applying those principles to the present case I have come to the conclusion that the provisions of the fourth of the extraordinary resolutions passed at the meeting of the debenture stockholders on November 11, 1913, are valid and binding on the company.

The Prior Lien Debenture Stock is what is commonly known as perpetual debenture stock—that is to say, no day is specified for the repayment of the principal moneys secured. The stockholders only become entitled to repayment if an order is made or an effective resolution is passed for the winding up of the company (otherwise than for the purpose of reconstruction), or if the company commits a breach of any of the conditions upon which the stock is issued, and the company cannot redeem the stock without going into liquidation. The doubt which formerly existed as to the validity of debenture stock of this nature was removed by s. 14 of the Companies Act, 1907, which is reproduced in a slightly altered form in s. 103 of the Companies (Consolidation) Act, 1908.

It is not suggested that the collateral bargain made with the Prior Lien Debenture stockholders to pay to them one-third of the surplus assets on a winding up was in any way unfair or unconscionable, or that it was in the nature of a penalty clogging the equity of redemption. It was, however, faintly suggested that this collateral bargain was in some way (which counsel failed to particularize) inconsistent with or repugnant to the contractual and equitable right of the company to redeem. In my opinion upon the facts of this case no such inconsistency or repugnancy exists. The only effect of the bargain is that when the company is wound up these stockholders will be entitled to receive one-third of the surplus assets in addition to the principal moneys secured by the stock. The bargain appears to me to have been

(1) [1914] A. C. 25.

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perfectly fair and businesslike, and in my judgment is valid and binding upon the company.

As regards the 6 per cent. debenture stock created in 1912 it is contended that the collateral bargain for payment to the holders of this stock of 50 per cent. (subsequently reduced to 33⅓ per cent.) of the surplus assets on a winding up is inconsistent with and repugnant to the right of the company to pay off this stock at any time on giving 6 months' notice under the power in that behalf reserved to the company by one of the conditions upon which the stock was issued. In support of this contention reliance is placed upon the decision in *Noakes & Co.* v. *Rice.* (1) In my judgment, however, that decision does not apply to the facts of the present case.

The effect of the bargain made with the 6 per cent. debenture stockholders is that such stockholders, in addition to the principal money secured, are to receive a collateral advantage in the shape of an additional sum of money which will become payable on a winding up. Lord Parker in the *New Patagonia Meat Co.'s Case* (2) points out that there is no objection to a mortgagee stipulating for a payment falling due after the principal moneys advanced are repaid.

The only distinction between the collateral bargain made with the Prior Lien Debenture stockholders and that made with the 6 per cent. debenture stockholders is that, if the company had given notice to pay off the latter stock before winding up, a longer interval would have elapsed between the time when the principal moneys became due and the time when the additional sum fell due than would be the case with regard to the Prior Lien Debenture Stock. In my opinion the fact that the payment of the additional sum is postponed until the winding up of the company does not render the bargain inconsistent with or repugnant to the contractual and equitable right of the company to redeem.

In *Noakes & Co.* v. *Rice* (1) the Court had to deal with an entirely different set of circumstances. In the first place it was not a case of debentures or debenture stock issued by a limited company, but of a mortgage between private

(1) [1902] A. C. 24. (2) [1914] A. C. 25, 58.

individuals, and, secondly, the mortgage in that case contained an express provision for the reconveyance of the mortgaged property on payment of the moneys secured. The decision in that case that the continuance of a tie in favour of the mortgagees after all moneys had been paid off was inconsistent with the express condition for reconveyance contained in the mortgage does not, in my judgment, govern the determination of the question in the present case.

Here the Court is considering a bargain for the payment to debenture stockholders of an additional sum on a winding up of the company. Such a bargain, if fairly made, is, in my opinion, valid, as it is neither in the nature of a penalty clogging the equity of redemption nor is it inconsistent with or repugnant to the contractual and equitable rights of the company to redeem.

There will be a declaration in accordance with this judgment, and the costs of the parties (to be taxed as between solicitor and client) will be paid by the liquidator and out of the assets.

Solicitors: *Gilbert Samuel & Co.; W. L. Dell.*

H. C. G.

SARGANT J.

1920

Nov. 17, 18, 19, 23; *Dec.* 21.

MORPETH CORPORATION *v.* NORTHUMBERLAND FARMERS' AUCTION MART COMPANY, LIMITED.

[1917. M. 681.]

Market—Ancient Charter—Market without Tolls—Rival Market—Disturbance—Proof of Damage—Charges under Markets and Fairs Clauses Act, 1847 (10 & 11 *Vict. c.* 14)—*Injunction.*

The holding of a rival market or auction mart within the prescribed distance and on the same day of the week as an ancient charter or franchise market is a disturbance by intendment of law, whether the rival market or mart is itself a later charter or franchise market or an unauthorized market held apart from charter, and in the latter case it is not necessary in the enforcement of the monopolistic rights attaching to the ancient market to prove damage notwithstanding that the ancient market is a market without tolls.

Yard v. *Ford* (1670) 2 Wms. Saund. 172; *Moseley* v. *Chadwick* (1782) 3 Doug. 117; *Dorchester Corporation* v. *Ensor* (1869) L. R. 4 Ex. 335; *Elwes* v. *Payne* (1879) 12 Ch. D. 468; *Great Eastern Ry. Co.* v. *Goldsmid* (1884) 9 App. Cas. 927; *Wilcox* v. *Steel* [1904] 1 Ch. 212 followed and applied.

Quaere, whether if the mere interference with their monopolistic rights is not in itself a ground for an injunction, the owners of an ancient charter market without tolls who have acquired power of charging tolls of another kind under the Markets and Fairs Clauses Act, 1847, cannot as proof of damage rely on the loss of those tolls as profits which they are enabled to make by virtue of their franchise.

Cork Corporation v. *Shinkwin* (1825) Smith & Bat. 395; and *Moseley* v. *Chadwick*, 3 Doug. 117 applied.

WITNESS ACTION.

The plaintiffs were the owners of an ancient franchise market in the Borough of Morpeth on Wednesdays in every week granted to their predecessor in title by a charter of King John in 1199, which was silent about tolls.

The defendants, the Northumberland Farmers' Auction Mart Co., Ld., were the owners of an auction mart situate in a field about 100 yards distant from the boundary of the borough of Morpeth. The defendants, Robert Donkin, Ld., were a company which, through Mr. Robert Donkin, carried on the business of auctioneers and conducted sales by auction of cattle and other animals at their co-defendants' auction mart.

For a long time previously to the year 1898 the franchise market and the site of the auction mart had a common owner and formed part of the Earl of Carlisle's Settled Estates. In that year the plaintiffs became sole owners of the franchise market, the predecessors in title of the defendant auction mart company being at that time tenants of the site of the auction mart the freehold of which was finally acquired from the Earl's successor in title under the settlement by the defendant auction mart company in 1915.

The writ in this action was issued on April 24, 1917, for an injunction to restrain the defendants from disturbing their ancient market, a declaration of their rights and damages.

The defence to the action consisted of two parts, the main defence, which is alone material for the purposes of this report, being that as the plaintiffs' charter gave no right to tolls, they could not succeed by virtue of their market monopoly as proof of damage in the circumstances was not possible. The further defence was that the plaintiffs by laches and acquiescence had lost their right to an injunction.

The material facts and result of the evidence relative to the main defence are set out in the following statement taken from the judgment of Sargant J.: "This is an action to restrain an alleged disturbance of market. The plaintiffs are the owners of an ancient market in the town of Morpeth on Wednesdays in every week for the sale of horses, cattle and other live stock. The defendants have recently been collaborating in holding frequent auction sales on Wednesdays of cattle and other live stock in a mart (hereinafter called "the Station Mart") situate quite close to the town of Morpeth and within less than half a mile of the site both of the place where the plaintiffs' market was originally held and of that to which it was transferred some seventeen or eighteen years ago. The plaintiffs say that this amounts to a disturbance of their market and are seeking to restrain it. But they are not seeking to restrain sales of fat cattle in the Station Mart on Mondays as it is clear that fat cattle cannot be sold profitably so late in the week as on Wednesdays. The main defence to the action is one mainly of law and is that the plaintiffs cannot

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succeed merely by virtue of their market monopoly and without proof of damage to their charter market and that no such damage is shown or indeed possible inasmuch as the plaintiffs' charter gave no right to tolls and no stallage or other like payments have ever been charged in relation thereto. There is also a second and subsidiary defence, which is one chiefly of fact, or, rather, perhaps one of mixed fact and law, namely, that any right the plaintiffs might otherwise have had to restrain the defendants' proceedings has been lost by laches and acquiescence. This second defence and the facts on which it is founded are substantially independent of the first defence and I will defer their consideration until I have dealt with the first defence."

"The plaintiffs' market rests on a charter of King John in the year 1199, which granted to Roger de Merlay and his heirs a fair (not now in question) in every year at Lady-day and market on Wednesday in every week. The grant is with the usual words as to all liberties and free customs pertaining to such fairs and markets; but inasmuch as there is no mention in the charter of the right to take toll, it seems that the market must be taken to be one without toll: *Earl of Egremont* v. *Saul.* (1) And this is confirmed by an Inquisition post mortem in the 5th year of Henry IV. in which the Wednesday market in question is expressly mentioned as being without tolls; and is not negatived by the mention in a subsequent Inquisition in the year 1418 of tollage and stallage, since these words are not necessarily referable to this particular subject matter."

"In the year 1285 a Charter of King Edward I. made an alteration as regards the fair but did not affect the market. The market and also apparently the freehold in the streets in Morpeth where it was held, ultimately became vested in or in trust for the late Earl of Carlisle, and by an agreement of the 23rd day of June, 1883, and made between the agent for the trustees of his settled estates of the one part and the Local Board of Health of the town of Morpeth (the predecessors of the plaintiff corporation) of the other part, the tolls of the markets and fairs held in the streets of the town of Morpeth,

(1) (1837) 6 Ad. & E. 924.

as such tolls were particularised in the schedule thereto, were let to the local board from year to year at a yearly rent of 10*l*. The tolls mentioned in that schedule relate exclusively to stallage for the sale of goods and merchandise; and from this fact and also from evidence given by Mr. Jardin, the town clerk of the plaintiff corporation, it is reasonably clear that nothing in the shape of stallage, pennage or the like, in respect of the sale of cattle or live stock, was ever taken while the market was held in its original place, namely, in the streets of Morpeth. This view is confirmed by a consideration of the bye-laws which were issued in the year 1896 by the corporation of the borough with respect to the market in question."

"In the year 1898 a compromise of various claims was effected between the plaintiff corporation, as the Urban District Council of the Borough of Morpeth, and the Earl of Carlisle. And as part of that compromise the earl conveyed to the plaintiffs, amongst other things, the markets, fairs, functions and rights granted by the said charters of King John and King Edward I. respectively to the predecessors of the Earl. From this time forward the plaintiffs became and they still are the sole owners of the market and fair granted by these two charters. There were obvious inconveniences attaching to the holding of a weekly market for live stock in the streets of the town, and in the early years of this century the plaintiffs proceeded to construct a separate market place for the purpose of holding weekly sales of cattle, sheep and other stock on Wednesdays, and also weekly sales on Mondays of fat cattle, calves, sheep and pigs. These markets were regulated by bye-laws made by the Town Council in September, 1905, under the powers of the Markets and Fairs Clauses Act, 1847, and the Public Health Act, 1875, and approved by the Local Government Board in October, 1905. These bye-laws provided for tolls in respect of animals brought into the market for sale or exposure for sale, and also for tolls in respect of the weighing of animals. The Monday markets were found to be unprofitable and were soon discontinued. The Wednesday markets have been continued down to the present day with a brief interruption due to regulations during

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the great war. The tolls authorised to be taken are altogether different in character from any tolls under an ancient charter and are, of course, not relied on as constituting an extension of any monopoly granted under the old charters of King John and King Edward. The evidence before me shows that the Wednesday sales of the defendants have caused a considerable and increasing diminution in the number of cattle and live stock brought to and sold in the plaintiffs' present market and a loss (for what that is worth) in the receipts of the plaintiffs from the tolls payable under their existing bye-laws. But there is necessarily no pecuniary loss to the plaintiffs in respect of their ancient market or ancient market rights per se, inasmuch as these alone never constituted a source of profit to the plaintiffs either by way of direct tolls or by way of stallage, pennage and the like."

Upjohn K.C., *Galbraith K.C.* and *Stuart Moore* for the plaintiffs. It is not necessary in an action of this kind to prove damage. Franchise is a right in rem and what the defendants have done has interfered with the plaintiffs' right.

By intendment of law, the holding of another market on the same day as a charter market amounts to disturbance. Bracton, Bk. IV., c. 46, F. 235*b*: *Moseley* v. *Chadwick* (1); *Dorchester Corporation* v. *Ensor* (2); *Elwes* v. *Payne* (3); *In re Islington Market Bill* (4); and *Wilcox* v. *Steel.* (5) It is not necessary to prove actual damage. It would be enough that they had deprived the plaintiffs of statutory tolls but they have also caused loss of stallage: *Cork Corporation* v. *Shinkwin* (6); Pease and Chitty's Law relating to Markets and Fairs, p. 76.

Tomlin K.C. and *J. G. Pease* for the defendants. The defendants rely on two defences: first, that the plaintiffs' market being an ancient market without tolls, the plaintiffs cannot succeed by virtue of their market monopoly; they must prove damage to their charter market, and this they cannot do as their charter gave no right to tolls. Secondly,

(1) 3 Doug. 117.
(2) L. R. 4 Ex. 335.
(3) 12 Ch. D. 468.
(4) (1835) 3 Cl. & F. 513.
(5) [1904] 1 Ch. 212.
(6) Smith & Bat. 395.

the defendants' market has been carried on for such a number of years as to preclude the plaintiffs from any remedy which otherwise they might have had.

The charter contains no grant of tolls, and the reference to tolls and stallage in the Inquisition post mortem of 1403 does not assist the plaintiffs, because any general power to charge which may be attributable to the borough cannot be referred to the charter in particular: *Lawrence* v. *Hitch* (1) illustrates that. Unless the charter grants tolls the patentee has no right to them: *Earl of Egremont* v. *Saul* (2); 2 Coke Inst., ed. 31, p. 220, and when granted they are taken from the buyers not from the sellers: *Attorney-General* v. *Horner* (*No.* 2). (3) The plaintiffs have taken nothing in the nature of tolls or stallages which could be attributable to the charter, or can entitle them to damages. The charges under s. 166 of the Public Health Act, 1875, are quite independent and cannot be annexed to tolls under the charter or be collected in a charter market which gave no right to tolls: *Ellis* v. *Bridgnorth Corporation*. (4) Unless the plaintiffs have a market with tolls then the defendants can carry on their business and disturbance by intendment of law does not apply, and to succeed at all the plaintiffs must prove damage. There is nothing in the books to support the contrary. *Dorchester Corporation* v. *Ensor* (5) contains mere dicta. Intendment of law only applies to two franchise markets with tolls held on the same day and where there are two such markets there must be an issue if the markets do not fall on the same day. Fitzherbert Nat. Brev. by Hale, 9 ed., p. 184; *Clinton's Case* (6), and *Weston's Case*. (7) It is not necessary to prove damage in proceedings quo warranto or scire facias; but when the proceedings are for abatement damage must be proved: *In re Islington Market Bill* (8); *Great Eastern Ry. Co.* v. *Goldsmid* (9); *Wilcox* v. *Steel* (10); and *Rex* v. *Marsden* (11);

(1) (1868) L. R. 3 Q. B. 521.
(2) 6 Ad. & E. 924.
(3) [1913] 2 Ch. 140.
(4) (1861) 2 J. & H. 67.
(5) L. R. 4 Ex. 335.
(6) Year Book 12 & 13 Edw. III. 20.
(7) Year Book, 11 Hen. IV. 47.
(8) 3 Cl. & F. 513.
(9) 9 App. Cas. 927, 949.
(10) [1904] 1 Ch. 212.
(11) (1765) 3 Burr. 1812.

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and *Moseley* v. *Chadwick* (1); the last two being cases of rival marts.

Galbraith K.C. in reply.

Cur. adv. vult.

Dec. 21. SARGANT J. [after stating the facts relative to the main defence as above set out continued:] The main question in the action is whether in the circumstances the plaintiffs can have any effective cause of action against the defendants. Prima facie the answer to this question would appear to be in the affirmative, for it is established law that the holding of a rival market within such a distance as in the present case and on the same day in the week is a disturbance of market by intendment of law: *Yard* v. *Ford* (2); *Dorchester Corporation* v. *Ensor* (3); *Elwes* v. *Payne* (4)—or at the least is a prima facie disturbance (*In re Islington Market Bill* (5), and perhaps *Clinton's Case.* (6)) Were it necessary to elect between these two alternative views, I should prefer the former as having the greater weight of authority. But it is unnecessary to make any such choice, since the evidence before me, so far from rebutting any prima facie presumption of disturbance, shows affirmatively that the plaintiffs' Wednesday market has been affected and the attendance and the sales there diminished by the defendants' Wednesday market auctions.

But it has been strenuously contended on behalf of the defendants that the legal proposition in question, in either of its two alternative forms, only applies to a disturbance such as is caused by the holding of a second market strictly so called, that is of a charter or franchise market; and does not apply to a disturbance arising from an unauthorized market held apart from charter. And it has been argued that, while in the former case the disturbance is a trespass strictly so called, and may therefore give a cause of action independent of damage, yet in the latter case the cause of action is not

(1) 3 Doug. 117.
(2) 2 Wms. Saund. 172, 174.
(3) L. R. 4 Ex. 335, 343.
(4) 12 Ch. D. 468, 472.
(5) 3 Cl. & F. 513.
(6) Year Book 12 & 13 Edw. III. 20.

complete without proof of damage, which is necessarily absent here by reason of the fact that the plaintiffs' charter market did not entitle them to tolls or profits of any kind. In my opinion, however, this argument is not supported by authority and is unsound.

The early cases, no doubt, are cases in which the defendant as well as the plaintiff had a market by charter, indeed without a charter it would have been dangerous if not impossible to hold the market at all. And further, the circumstance that the defendant had a market by charter would tend to remove any ambiguity from any acts of his that might otherwise be of a doubtful character, and to show that he was holding a market in fact. But when once it is conclusively established, as in this case, that a market is in fact being held by the defendant, there is in my judgment the same clear trespass on the monopolistic right of the plaintiff whether the infringing market is one under a charter or is one held quite independently of a charter: *Wilcox* v. *Steel.* (1) Indeed the language of the cases seems rather to show that the plaintiff with the prior charter succeeded against the defendant with the subsequent charter not because of that subsequent charter but in spite of it: see *Yard* v. *Ford.* (2) And if it were not so the odd result might follow that a plaintiff might succeed by scire facias in repealing the defendant's subsequent charter, and then after all be unable to prevent the defendant from carrying on the same or a similar market without the aid of any charter. It seems to me that trespass is a question of fact, and that a market monopoly under letters patent may be as effectually trespassed on by an infringer who has no title at all, as by one who infringes under colour of some right which proves ultimately to be insufficient: *Yard* v. *Ford* (2); *Moseley* v. *Chadwick* (3); *Great Eastern Ry. Co.* v. *Goldsmid* (4); *Dorchester Corporation* v. *Ensor* (5); *Elwes* v. *Payne.* (6) Clearly this is so in the case of a deliberate trespass on the monopolistic rights involved in the occupation of land or (a still closer

(1) [1904] 1 Ch. 212.
(2) 2 Wms. Saund. 172, 174.
(3) 3 Doug. 117.
(4) 9 App. Cas. 927.
(5) L. R. 4 Ex. 335.
(6) 12 Ch. D. 468.

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analogy) on the monopoly conferred by a grant of letters patent in respect of an invention.

Further, even if the mere interference with the exclusive privilege of holding a market is not in itself a ground, as I think it is, for the recovery of at least nominal damages: see *Cork Corporation* v. *Shinkwin* (1), and therefore for an injunction, I am by no means clear that the plaintiffs here are not entitled to rely on the damage in fact accruing to them from the loss of the tolls now exigible by them under their recent powers. It was held in the case last cited, and was not contested by the defendants, that the owner of a franchise market without tolls who is also owner of the land on which the market is held, can rely upon loss of stallage as part of the damages caused by an infringing or disturbing market, because stallage, though not a toll to the owner of the franchise, is a profit which he is enabled to make by virtue of the franchise: see *Moseley* v. *Chadwick*. (2) On the same principle it may well be that a corporation who, by virtue of their ownership of an ancient market without tolls, have acquired the power of charging tolls of another kind under the Markets and Fairs Act, can rely on the loss of these tolls as profits which they are enabled to make by virtue of their franchise and in the course of the natural and incidental development or exploitation of their ancient monopoly; and I may add that the saving clauses of ss. 166 and 167 of the Public Health Act, 1875, and the observations of Wood V.-C. in *Ellis* v. *Bridgnorth Corporation* (3), are not applicable to the present case. This, however, is not the main ground of my judgment, which I prefer to rest on the plaintiffs' right to enforce their monopoly irrespectively of showing actual loss.

The second or subsidiary defence has now to be examined—namely, that the plaintiffs have lost their prima facie rights by laches and acquiescence. The relevant facts as regards this defence are as follows: [His Lordship stated the facts and the result of the evidence relative to this further defence and came to the conclusion that, in the circumstances, a grant or

(1) Smith & Bat. 395, 402. (2) 3 Doug. 117.
(3) 2 J. & H. 67.

licence to the defendants could not be presumed, and that mere quiescence or inertness on the part of the plaintiffs which had not continued long enough to satisfy the requirements of the Statutes of Limitation, either directly or by analogy, had not constituted a bar to the enforcement of their legal right.]

There will be a declaration that the plaintiffs are entitled to an ancient market to be held on Wednesday in every week in the town of Morpeth, in the County of Northumberland. I do not add "to the tolls, stallage and other profits to the said market appertaining," as asked in the statement of claim, because there do not seem to be any. Then the injunction will be in form to restrain the defendants, their directors, servants, agents and workmen, from holding a sale or auction mart or carrying on the business of sales or of an auction mart and the sale of horses, beasts, cows, sheep, pigs or other animals at Morpeth Castle on Wednesdays in any week—that will restrain what they have been actually doing—or otherwise using or permitting to be used any portion of their property in such a manner as to disturb, interfere with or prejudicially affect the market rights of the plaintiffs at Morpeth, in the said county. Then, of course, I give the plaintiffs the costs of the action.

Solicitors for plaintiffs: *Milner & Bickford, for Thomas D. Shaw, Morpeth.*

Solicitors for defendants: *Torr & Co., for T. & R. Nicholson, Morpeth.*

F. E.

Dictum of LORD STERNDALE, M.R. at p. 174, *applied*. *Re* WRIGHT (A BANKRUPT). [1949] 2 All E.R. 605.

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In re FARROW'S BANK, LIMITED.

[No. 00485 of 1920.]

Company—Compulsory Winding Up—Lease—Covenant against Assignment without Consent—Power of Liquidator to assign.

A covenant in a lease to a company against assignment without the consent of the lessor is binding on the liquidator in a compulsory winding up of the company. There is no distinction for this purpose between a voluntary and a compulsory winding up.

So held by the Court of Appeal, reversing the decision of P. O. Lawrence J.

The cases in bankruptcy in which it has been held that a trustee in bankruptcy can assign free from the bankrupt's covenant against assignment without licence depend on the circumstance that the bankrupt's leasehold interest vests in his trustee by operation of law, so that he is not an assign of the bankrupt and consequently not bound by the covenant. These cases therefore have no application to a liquidator of a company, because the company's leasehold interest remains vested in the company after a winding up order and the liquidator acts on behalf of the company in assigning it.

SUMMONS.

By deed of lease dated November 23, 1910, Mrs. Clara Isabella Curtis demised to Farrow's Bank, Ld., 182, Balham High Road, in the County of London, for the term of 21 years, from December 25, 1910, at the yearly rent of 150*l*. The lease contained a covenant by the lessees for themselves, their successors and assigns not to "assign the said demised premises or any part thereof without the previous consent in writing of the lessor first obtained" and a proviso for re-entry if (amongst other things) the company should enter into liquidation whether compulsory or voluntary by reason of insolvency.

By an order dated January 11, 1921, Farrow's Bank, Ld., were ordered to be wound up compulsorily, and the official receiver was appointed the provisional liquidator. On February 4, 1921, the lessor gave notice pursuant to s. 14 of the Conveyancing Act, 1881, requiring possession of the premises under the proviso for re-entry.

On April 5, 1921, the provisional liquidator took out this summons asking (1.) for relief against the forfeiture and (2.) for a declaration that notwithstanding the covenant

restrictive of assignment contained in the lease the applicant, as such liquidator, was entitled to assign the premises without the consent of the lessor. Relief was granted on terms against the forfeiture, and the only question calling for report is as to the power of the liquidator to assign without the consent of the lessor.

The summons was heard before P. O. Lawrence J. on May 3, 1921.

W. A. Greene for the liquidator. The question is whether a covenant restricting assignment is binding on a liquidator. The authorities show that a trustee in bankruptcy is not bound by such a covenant, the reason being that where an assignment is made necessary by law it is not a breach of a covenant against assignment. That is beyond question in the case of bankruptcy, but there has been no direct decision as to the position of a liquidator in the compulsory winding up of a company.

In *In re Birkbeck Permanent Benefit Building Society* (1) it was held that the liquidator in whom the property of the Building Society had been vested by a vesting order could assign a leasehold interest without committing a breach of a covenant against assignment. The only distinction between that case and the present is that a limited company's assets do not vest in the liquidator. That really makes no difference, as is shown by *Cohen* v. *Popular Restaurants, Ld.* (2), where Rowlatt J. while holding that a voluntary liquidator could not assign in breach of a covenant against assignment without consent, seems to suggest that this would not be so in the case of a liquidator in a compulsory winding up.

J. W. F. Beaumont for the lessor. The question is admittedly one of construction on the covenant. The reason a trustee in bankruptcy can assign without breach of covenant is that the bankrupt's property is vested in him by law, which is no breach of the covenant, and that he can then assign because he is not an assignee of the lessee and therefore not bound by the covenant. That is also the

(1) [1913] 2 Ch. 34. (2) [1917] 1 K. B. 480.

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explanation of *In re Birkbeck Permanent Benefit Building Society* (1), where the property vested in the liquidator by virtue of a vesting order: compare *Doe* v. *Bevan* (2), which was relied on in that case.

[P. O. LAWRENCE J. Although the actual decision in *Doe* v. *Bevan* (2) may not apply here, there are references in that case to *Doe* v. *Carter* (3) which look as if that case might.]

Doe v. *Carter* (3) was the case of an assignment by a sheriff under an execution. The sheriff is not an assignee of the lessee whose leasehold property is taken in execution, and he sells in his own name and under his own seal: *Doe* v. *Brawn.* (4) Here the assignment would be by the company, and that would be a direct breach of the company's own covenant.

[P. O. LAWRENCE J. The assignment by the company would be involuntary.]

There is no ground for limiting the covenant as matter of construction to voluntary acts.

P. O. LAWRENCE J. [after stating the facts]. In these circumstances the liquidator applies to the Court to have it determined whether he can assign the property comprised in this lease without the consent of the lessor, notwithstanding the covenant against assignment without that consent.

Mr. Greene, in support of his argument, has relied upon the decisions in *In re Birkbeck Permanent Benefit Building Society* (1) and *Cohen* v. *Popular Restaurants, Ld.* (5) In the *Birkbeck Case* (1) Neville J., following *Doe* v. *Bevan* (2), held (inter alia) that the liquidator was not an assign of the building society within the meaning of the condition there in question, and that an assignment by him was outside of, and therefore not prohibited by, the condition. In that case, however, a vesting order had been made by the Court whereby the whole of the Building Society's property had

(1) [1913] 2 Ch. 34.
(2) (1815) 3 M. & S. 353.
(3) (1798) 8 T. R. 57.
(4) (1821) 5 B. & Al. 243.
(5) [1917] 1 K. B. 480.

been vested in the liquidator and in that respect it is distinguishable from the present case.

In *Cohen* v. *Popular Restaurants, Ld.* (1), Rowlatt J. held that an assignment by a voluntary liquidator without first obtaining the consent of the lessor constituted a breach of covenant not to assign without the consent of the lessor. The learned judge distinguished the *Birkbeck Case* (2) on the ground that there a compulsory winding up order had been made, and that the assignment was by the officer of the Court, whereas in the case before him it was the act of the liquidator who had been brought into existence by the voluntary act of the company. The learned judge made no reference to the vesting order which had been made in the *Birkbeck Case* (2), and therefore there is some justification for Mr. Greene's contention that the inference is that had the assignment been made by a liquidator in a compulsory winding up, the learned judge would not have held as he did.

The case of *Doe* v. *Bevan* (3) which was relied upon by Neville J. in the *Birkbeck Case* (2) is not strictly in point, because there the matter for decision was whether the assignees under a commission of bankruptcy to whom the property had been assigned by the Commissioners could assign it without the consent of the lessor, and it was decided that they could. In arriving at this decision the learned judges relied largely on *Doe* v. *Carter* (4), and at my invitation Mr. Beaumont has referred me to that case. In *Doe* v. *Carter* (4) a lease was taken into execution and sold by the sheriff without obtaining the lessor's consent, and it was decided that the sale was not within the terms of a covenant by which the lessee covenanted not "to let, set, assign, transfer, make over, barter, exchange, or otherwise part with this indenture or said messuage, lands, etc., hereby demised" without the consent of the lessor. The principle upon which that case was decided was that covenants of this nature are inserted in leases in order to guard against voluntary assignments by the lessees and do not, in the absence of an

(1) [1917] 1 K. B. 480.
(2) [1913] 2 Ch. 34.
(3) 3 M. & S. 353.
(4) 8 T. R. 57.

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express provision to the contrary, apply to assignments made by a person acting paramount to the lessee in discharge of a duty cast upon him by the law.

The principle thus established is applicable, in my judgment, to the present case. Although a sheriff assigns in his own name and under his own seal whereas a liquidator assigns in the name and under the seal of the company, yet in my judgment the application of the principle does not depend upon the mere form of the assignment. An assignment by a liquidator in a compulsory winding up is in invitum of the company, and is made in discharge of the duty cast upon him by the Companies (Consolidation) Act, 1908, of realizing the assets for the benefit of creditors, and therefore is, in my opinion, indistinguishable in principle from an assignment by a sheriff.

In accordance therefore with the principle laid down in *Doe* v. *Carter* (1) I hold that the covenant in the present case does not on its true construction extend to assignments which pass in invitum of the lessee, and consequently that the liquidator is entitled to assign the property comprised in the lease without the consent of the lessor.

H. C. G.

C. A.

The lessor appealed. The appeal was heard on June 21, 22, 1921.

J. W. F. Beaumont for the appellant. In a liquidation the property of the company is not vested in the liquidator. The liquidator merely acts on behalf of the company. In the Court below it was suggested that there was an analogy between the present case and that of a sale by a sheriff of leasehold property taken in execution and a sale by a trustee in bankruptcy, and *Doe* v. *Carter* (1) was relied on. That case, it is submitted, has no application to the present, as the assignment there was by the sheriff, who was not an assignee and was therefore not bound by the covenant, whilst here the proposed assignment would be by the company itself. [He was stopped.]

(1) 8 T. R. 57.

W. A. Greene for the respondent. The only question is whether an assignment by the liquidator in the name of the company is an "assignment" within the meaning of the covenant against alienation without licence in the lease. The relevant sections of the Companies (Consolidation) Act, 1908, which deal with the powers of a liquidator in a compulsory liquidation, are s. 150, sub-s. 1, and s. 151, sub-s. 2. Sect. 150, sub-s. 1, provides: "In a winding up by the Court the liquidator shall take into his custody, or under his control, all the property and things in action to which the company is or appears to be entitled." Sect. 151, sub-s. 2, provides that the liquidator shall have power (inter alia) "(*a*) To sell the real and personal property, and things in action of the company, by public auction or private contract with power to transfer the whole thereof to any person or company," and "(*b*) To do all acts and to execute, in the name and on behalf of the company, all deeds, receipts, and other documents, and for that purpose to use, when necessary, the company's seal." Under the latter sub-section it is the liquidator who does the act, although he does it in the name of the company. What is here proposed to be done is an act by the liquidator in the name of the company. By s. 163, sub-s. 1, the liquidator is to cause the assets of the company to be collected, and applied in discharge of its liabilities. Rule 75 of the Companies Winding-up Rules, 1909, provides for the collection and distribution of the assets by the liquidator in a winding up by the Court.

The question is whether in the case of a compulsory winding up the company is a voluntary party to an assignment made in its name by the liquidator. Is such an assignment the voluntary act of the company? It is submitted it is not. By the liquidation the company is deprived of all volition it formerly possessed and is compelled to act in accordance with the directions of an officer of the Court. It has been the invariable practice to construe covenants like the one in question as applying to voluntary assignments and not as extending to assignments in invitum, and an assignment by a company in compulsory liquidation falls within the

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latter class. The effect of the liquidation is to divest the company of all beneficial interest in its property. The property of the company becomes impressed with a trust, and must be dealt with by the proper officer in a particular way: see per James L.J. in *In re Oriental Inland Steam Co.* (1)

[LORD STERNDALE M.R. If this is not the property of the company beneficially, whose property is it beneficially?]

The language of James L.J. cannot, it is admitted, be pressed too far so as to fit in with the strict idea of a trust. It is referred to only to make good the point that a company in liquidation cannot do what it likes with its own property. Its power of disposition is taken away by statute.

[YOUNGER L.J. referred to s. 186, sub-s. iii., of the Companies (Consolidation) Act, 1908.]

The property of the company no doubt remains vested in the company, but it is submitted that the act of the liquidator in assigning it is not the voluntary act of the company. It is not possible to say of the company that the assignment is its voluntary act.

It is submitted there is a distinction between a voluntary and a compulsory liquidation. In the former case the liquidator is called into existence by the company itself: in the latter he is imposed upon the company by an order of the Court. The technical nature of the distinction contended for by the appellant is shown in the case of an unregistered company. In that case if a vesting order is made under s. 272 of the Companies (Consolidation) Act, 1908, the liquidator can assign without licence: *In re Birkbeck Permanent Benefit Building Society.* (2)

As regards the bankruptcy cases, it was held in *Goring* v. *Warner* (3) that neither the assignment by the Commissioners of the debtor's lease to the creditors' assignees nor the assignment by the latter to a purchaser was a breach of a covenant not to assign without licence. In those days two

(1) (1874) L. R. 9 Ch. 557, 559. (2) [1913] 2 Ch. 34.
(3) (1724) 2 Eq. Cas. Abr. 100.

assignments of the debtor's property were necessary : first an assignment by the Commissioners of Bankruptcy to the creditors' assignees, and then an assignment by the creditors' assignees to the purchaser. The Bankruptcy Act, 1831 (1 & 2 Will. 4, c. 56), was the first Act of the Bankruptcy Acts which vested the property directly in the assignees (see ss. 25, 26).

[LORD STERNDALE M.R. If you can show that that case is the same as this it would be an authority in your favour. But the Lord Chancellor there says that it was a special case.]

In that case it was held that the effect of the Bankruptcy Statutes was to override the contract between the parties, and it is submitted it is the same in the case of the Companies Acts. The principle there laid down was followed in *Doe* v. *Bevan* (1), where it was held that "assign" did not extend to an assign by operation of law. If therefore an assign means a voluntary assign then an assignment must mean a voluntary assignment. That is at the bottom of the bankruptcy cases. If that be so, there will here be no voluntary assignment by the company. An assignment in invitum is not an assignment within the meaning of the covenant : *Doe* v. *Carter*. (2)

[WARRINGTON L.J. What we have here to deal with is an assignment by the tenant himself.]

Any act done by a person in pursuance of a statutory duty is not a voluntary act.

[LORD STERNDALE M.R. Can you refer us to any case in which a trustee in bankruptcy has been held to be an assign within a covenant of this kind ?]

No. In *In re Birkbeck Permanent Benefit Building Society* (3) it was held that the liquidator in whom the property of the building society had been vested by a vesting order could assign without committing a breach of a covenant against assignment. In that case Neville J. said : "*Doe* v. *Bevan* (1) clearly shows that prima facie a contractual restriction of assignment does not apply to the assignment by a person

(1) 3 M. & S. 353, 357. (2) 8 T. R. 57.
(3) [1913] 2 Ch. 34, 38.

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on whom the property has devolved by operation of law, and who is under an obligation to assign." In *Cohen* v. *Popular Restaurants, Ld.* (1), the company was the assign of a lease containing a covenant by the lessee not to assign the demised premises without the lessor's previous licence and consent in writing not to be unreasonably withheld in the case of a respectable and responsible person being offered as tenant. The company went into voluntary liquidation, in which the liquidator without licence or consent of the lessor assigned the lease without offering a responsible person as tenant, and it was held that that constituted a breach of the covenant not to assign. That case illustrates the difference in the position of a liquidator in a voluntary and in a compulsory liquidation. In the former his act is treated as the act of the company, whereas in the latter he is regarded as a person imposed upon the company without its having any choice in the matter, and consequently an assignment by him in the name of the company cannot be treated as an assignment by the company.

J. W. F. Beaumont was not called upon to reply.

LORD STERNDALE M.R. I am sorry to say I cannot agree with the decision of the learned judge in this case. The question arises out of the unfortunate affairs of Farrow's Bank. The Bank held a tenancy of certain premises at 182, Balham High Road, on certain terms, of which I need only refer to two. One was a proviso that if the lessees, being a company, should enter into liquidation, whether compulsory or voluntary, by reason of insolvency, the lessor might re-enter. The Bank did, of course, enter into liquidation compulsorily by reason of insolvency; but the liquidator has obtained relief against the forfeiture contained in that proviso, and no question now arises upon that point. That relief was given by the same order as that in which the declaration with which we have to deal was made, and, if it were necessary, I am not at all sure that we might not consider the two questions together, although there is no

(1) [1917] 1 K. B. 480.

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appeal against the order so far as it grants relief; but I do not think it is necessary to do so.

The covenant with which we have to deal is a covenant by the lessees, for themselves, their successors and assigns, that they "will not assign the said demised premises or any part thereof without the previous consent in writing of the lessor first obtained." The learned judge has made an order declaring that "notwithstanding the covenant restrictive of assignment by the company in the said indenture of lease contained the applicant as such liquidator as aforesaid is entitled to sell and assign the said premises without the consent of the said respondent."

The question turns upon the position of a liquidator in a compulsory liquidation. I am not going to read all the sections of the Companies (Consolidation) Act, 1908, which deal with his powers. It is sufficient to refer to s. 151, which, by sub-s. 1, provides that the liquidator in a winding up by the Court shall have power "(*a*) to bring or defend any action or other legal proceeding in the name and on behalf of the company; (*b*) to carry on the business of the company, so far as may be necessary for the beneficial winding-up thereof"; and sub-s. 2 (*a*), which provides that he shall have power "To sell the real and personal property, and things in action of the company by public auction or private contract, with power to transfer the whole thereof to any person or company, or to sell the same in parcels." But the whole of these powers given to him are to do acts on behalf of the company. There is no express provision in the Act in the case of a compulsory liquidation as there is in the case of a voluntary liquidation, that the powers of the directors shall cease on the appointment of a liquidator (see s. 186 iii.), but they do in fact cease on the appointment of a liquidator in a compulsory liquidation. In that case the liquidator is imposed upon the company compulsorily by the Court to do acts on behalf of the company and to carry on the business of the company so far as it shall be necessary for the purposes of the winding up. It is quite true that the company does not choose him; he is put there by the Court; but he is

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put there to do the acts which the directors of the company did before their powers ceased: with this restriction, of course, that in all that he does he must have regard to the interests of the creditors of the company. The question is whether an assignment by the liquidator in these circumstances without the consent of the lessor is a breach of the covenant to which I have referred. The assignment would be made by the liquidator acting on behalf of the company. It would therefore be an assignment by the company itself, and if made without the consent of the lessor, it would, in my opinion, be as plain a breach of the covenant as could possibly be; and I have seen and heard of no authority that seems to me to afford any support to the contrary contention, with the possible exception of *In re Birkbeck Permanent Benefit Building Society* (1) before Neville J., although I do not think that that case does afford such support. In that case the society, being an unregistered company, all its property had been vested in the liquidator, and therefore it no longer remained the property of the society, whereas in this case the property remained the property of the company; and, as I have said, all the acts of the liquidator were done on behalf of the company. There seems to have been a provision in the *Birkbeck Case* (1) excepting assignments by operation of law which expressly prevented the assignment which there took place from being such an assignment as to work a forfeiture. Therefore that case is, in my opinion, no authority in support of the liquidator's contention, as what Neville J. there said was based upon the fact that there had been a vesting of the property of the company in the liquidator. All the other cases which have been cited to us have been cases of assignments by trustees in bankruptcy. Now, as has been pointed out, the position of the trustee in bankruptcy is quite different from that of a liquidator. He does not act on behalf of the bankrupt; he does not dispose of the bankrupt's property as such; all the property is vested in him. The real question which arose in the bankruptcy cases to which we have been referred may be stated in this

(1) [1913] 2 Ch. 34.

way. There was a covenant that the lessee should not assign without the consent of the lessor, and that bound him and his assigns. The trustee in bankruptcy had assigned without the consent of the lessor. Was that an act of the lessee or his assigns? It was not of course necessary to hold that the assignment was not his act; that was obvious on the face of it; and what was held was that the trustee in bankruptcy was not the assign of the bankrupt within the meaning of the covenant, because the covenant related only to voluntary assigns and not to assigns in law. That is really the basis of all those decisions, whatever may have been the language used. But here, as I say, the act would be the act of the company acting through its liquidator who is carrying on its business for the purpose of the winding up, and who in doing the act would be doing it strictly on behalf of the company.

It seems to me, therefore, that the proposed assignment would be distinctly within the actual words of the covenant, and that the declaration should be altered by simply saying that the applicant as such liquidator is not entitled to sell and assign the said premises without written consent of the said respondent. I think the appeal should be allowed.

WARRINGTON L.J. I am of the same opinion, and can state my view in a very few words. I should not add anything at all to what has already been said were it not that we are differing from the learned judge in the Court below.

In this case the company has covenanted that it will not assign the demised premises without the previous consent in writing of the lessor. It proposes to assign them without that consent, and to do so under its seal. The seal will be affixed not by the directors who in the ordinary way conduct the business of the company, but by the liquidator; and it is said that because the seal would be affixed by the liquidator, therefore the assignment is not the act of the company, and that the company will not, in so assigning, be committing a breach of the covenant. In my opinion there is nothing in

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the covenant which allows us to put any such construction upon it. It is a covenant that the company will not assign without consent. The company proposes to assign without consent, and therefore such an assignment would be a breach of the covenant.

YOUNGER L.J. At the commencement of this liquidation the Bank was possessed of this valuable leasehold property. It was valuable either because it was held at a rent less than a rack rent, and was a realizable asset on that score, or because its continued possession was of advantage to the liquidation. The liquidator was therefore desirous to retain as against the landlord the company's interest in this property, and, notwithstanding the liquidation, he would have been entitled to do so without question but for a provision in the lease to the effect that in the event of the company, the lessee, going into liquidation the lessor was entitled to determine the lease and re-enter upon the premises. This right the lessor threatened to exercise: the liquidator thereupon applied to the Court for relief, and the Court in this very order, the subject of this appeal, granted relief upon terms not touching the question which is now in debate. The lease contains a covenant that the lessees, the Bank, shall not assign the demised premises or any part thereof without the previous consent of the lessor first obtained. The learned judge at the instance of the liquidator has declared, not, as part of the terms of relief against forfeiture, but in answer to a substantive question, that in this compulsory liquidation, the liquidator in the name of the company may notwithstanding that prohibition assign the demised premises without obtaining any consent, and the question we have to determine is whether he was right in so holding.

Now we have not heard Mr. Beaumont in reply, and I may be mistaken in the view I hold, but, as at present advised, I cannot help thinking that this question need not in the present case have arisen in the crude form in which it comes before us, if the learned judge had regarded the terms on which the liquidator might on behalf of the company assign

the premises, as appropriate for consideration in connection with the conditions of relief. I cannot doubt that it would have been permissible for the learned judge, had he thought fit, to reserve some veto upon assignment as a condition of relief, being of the opinion he was that by reason of the liquidation the necessity of obtaining the lessor's consent was gone. I quite agree, however, that it was only on this view of the matter that the learned judge could so have acted. If Mr. Beaumont's view that the covenant against assignment without consent remained unaffected by the liquidation was correct, the learned judge could not have modified it without his client's consent. No attempt however to deal with the matter on these lines was made. The learned judge disposed of the two questions separately, and declared, as an independent part of the order he made, that the liquidator would in the name of the company be entitled to assign this lease without any consent asked for or given.

Now, in my opinion, a liquidator has, in such circumstances as the present, no such right. So far as the terms of the lease are concerned it would be, I think, a clear breach of the covenant contained in it, if any such assignment were executed without first obtaining the lessor's assent. Nor can I myself see any reason or equity why those interested in the liquidation should at the expense of the lessor be dispensed from compliance with an essential condition of the company's lease—one regarded as so essential that it is not within the power of the Court to relieve against a breach of it. I do not, in saying this, forget that there are passages to be found in the bankruptcy cases referred to by Mr. Greene which give force to his argument that we ought to regard this question on what may be called broader grounds, but, speaking for myself, I am not disposed to do so.

These bankruptcy cases are somewhat anomalous. They are based on no very intelligible principle: in some degree, for instance, the personal liability of the trustee enters into them, and the question also whether he is an assign under such a covenant. Such considerations have no place where the lessee is a company in liquidation in whose name the

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liquidator acts, and when I consider the already favourable position as against its lessor of a company in liquidation I am not disposed to extend these bankruptcy decisions, anomalous as they are, to the case. And I am the more confirmed in this when I find that the extension is not said to apply to a company in voluntary liquidation. Mr. Greene reluctantly agrees that the application of the principle invoked by him would not entitle him to say that an assignment of the company's leaseholds by the liquidator in a voluntary liquidation is not subject to the same restrictions as an assignment by the company before liquidation. It is only a liquidator acting under a compulsory order who is, he contends, free from such restrictions. As soon as that distinction is sought to be introduced—and it has judicially been already made: see *Cohen* v. *Popular Restaurants, Ltd.* (1)—the objections against extending the principle to liquidating companies at all are reinforced: because, as we perfectly well know, a voluntary liquidation brought about by the insolvency of a company is in no relevant respect different from a compulsory liquidation arising from the same cause; while the right of a contributory to receive his share of surplus assets in such a liquidation where the company is solvent is just as complete as the right of a creditor to be paid his dividend where it is not. It would, to my mind, be both anomalous and contrary to all true principle to have to hold that in the case of every voluntary liquidation the company's leaseholds remained subject to this restriction, but that in the case of a company, possibly more solvent, but which happened to be in compulsory liquidation, the restriction had disappeared. In my judgment this principle if it is to be extended to any company in liquidation must be extended to all, and I can myself see no logical necessity and certainly no justification for extending the bankruptcy decisions, such as they are, to the liquidation under the Companies Act of any registered company at all. I think any attempt to assign here without the consent of the lessor first obtained remains a distinct

(1) [1917] 1 K. B. 480.

breach of covenant, and accordingly the declaration to the contrary made by the learned judge ought not, in my judgment, to stand.

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Appeal allowed.

Solicitors for liquidator: *Peter Thomas & Clark.*
Solicitor for lessor: *R. A. L. Broadley.*

W. I. C.

EVE J 1921 *June* 9.

In re AINSWORTH.

In re YATES.

YATES *v.* WORMALD.

[1921. A. 1903.]

Power of Appointment—Special Power to appoint to Uses—Appointment to Trustees upon Trust for Sale—Power to postpone Sale and manage meanwhile—Validity.

Where a special power to appoint land (including undeveloped building land) to uses for the benefit of all and every or such one or more exclusively of the other or others of the children or other issue of Y., "in such shares and proportions manner and form and for such interest or interests and subject to such restrictions conditions and limitations over in favour of any other or others of such child children or other issue" as the donee of the power shall by deed or will appoint, is exercised by an appointment to the use of trustees upon trust for sale and to hold the proceeds of sale upon settled trusts in favour of objects of the power, it is not an excessive exercise of the power of appointment to confer on the trustees a discretionary power to postpone sale and in the meanwhile the fullest powers of management and leasing.

ADJOURNED SUMMONS.

By her will dated November 27, 1867, Hannah Ainsworth who died in 1872 appointed and devised all her real estate in the Parish of Prestwich-cum-Oldham, Lancashire, called Pit Bank Estate, subject to a life interest in favour of James Yates, to the use of trustees during the life of Anne Frances Yates upon a trust for her benefit which failed with remainder "to such uses for the benefit of all and every or such one or

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more exclusively of the others or other of the child children or other issue of the said Anne Frances Yates living at the decease of the said James Yates or born within 21 years afterwards in such shares and proportions manner and form and for such interest or interests and subject to such restrictions conditions and limitations over in favour of any other or others of such child children or other issue as the said James Yates shall by deed or will direct limit or appoint give or bequeath the same." The will conferred on the trustees wide powers of leasing and managing the real estate.

By his will dated March 2, 1915, James Yates in exercise of this power of appointment directed, limited and appointed that the Pit Bank Estate should go remain and be to the use of trustees in fee simple upon trust that they should in such manner under such stipulations and upon such terms and conditions in all respects as they should in their uncontrolled discretion think fit sell the same and invest the money to be produced by such sale and conversion in manner therein mentioned and stand possessed of such moneys and of the investments thereof upon trust for the three children of Anne Frances Yates in the shares therein mentioned, the share of each child being settled upon trust for such child for life and after his or her death upon trust for his or her issue born within 21 years of the death of the testator as therein mentioned.

Later in his will the testator declared that it should be lawful for the trustees to postpone the sale and conversion of (inter alia) the Pit Bank Estate so long as they in their uncontrolled discretion should think fit, and the testator empowered his trustees during such postponement to manage and cultivate the same with all the powers in that behalf of absolute owners including a power to lease or let for such term or terms and on such terms and conditions as they might think fit and to cut timber and underwood for sale, repairs or otherwise and to repair and insure houses and buildings and to make allowances to and arrangements with tenants and to accept surrenders of leases and tenancies

with power also to lay out money in improvements. The testator also declared that his trustees should until the sale of (inter alia) Pit Bank Estate have the same and like powers of leasing for 21 years in possession or for any term of years by way of building, repairing or improving lease or for digging earth or clay or the making of bricks or tiles or of making grants in fee in consideration of a rent charge fee farm rent or other reservations and of granting rights of way and other easements and of improving and managing the estate as had been given by the will of Hannah Ainsworth in regard to Pit Bank Estate. The testator further declared that his trustees should during such postponement be empowered to exercise all such powers of leasing and sale and other powers of every description which might be applicable thereto as were by the Settled Land Acts, 1882 to 1890, conferred upon tenants for life with certain alterations and extensions as therein mentioned.

By a codicil dated May 19, 1915, the testator who died on April 9, 1919, appointed part of the Pit Bank Estate to his son William B. Yates in fee, but in all other respects confirmed his will.

The Pit Bank Estate comprised about 51 acres, 3 roods of land and produced 1401*l.* 11*s.* 1*d.* per annum. A considerable part of the estate was at the testator's death let on chief rents, but about 17 acres 3 roods were undeveloped land eligible for building purposes. The evidence was that a sale of the Pit Bank Estate had always been since the testator's death and still was very undesirable. The chief rents were depreciated to the extent of about 7000*l.* since before the war, and the building land was unsaleable except at a great sacrifice.

This summons was taken out by the trustees to have it determined (1.) whether the power of appointment enabled the testator not only to appoint the estate to the trustees upon trust for sale but also to confer on them power to postpone such sale so long as they should in their discretion think proper; and (2.) if the trustees might retain the Pit Bank Estate, whether the power of management, leasing or

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other powers purported to be given by the testator to them over the estate whilst remaining unsold were authorized by the power of appointment.

Brabant for the trustees. It is well settled that a special power to appoint to uses may be validly exercised by an appointment to the use of trustees in fee upon trust for sale and to hold the proceeds of sale in trust for objects of the power: *Kenworthy* v. *Bate* (1); *In re Paget* (2); *In re Redgate.* (3) The ground upon which it would be suggested that a grant of a discretionary power to postpone sale and in the meanwhile to manage and lease is that it would amount to a delegation by the donee of his power, and would therefore be invalid: *In re Greenslade.* (4)

In that case the delegation enabled the benefit conferred to be diverted from some to other objects of the power. No such objection exists here. The discretionary powers given to the trustees are really necessary incidents of the trust for sale.

Chetwynd Leech for the adult appointees. It is very desirable that no sale should take place at present. It is suggested that powers to postpone sale and to manage meanwhile are ancillary to the trust for sale.

The infant appointees were not represented.

EVE J. [after stating the facts:] It cannot be disputed that the power to appoint was validly exercised by the appointment to the use of trustees upon trust for sale and to hold the proceeds of sale in trust for objects of the power. The question is whether a superadded discretionary power to the trustees to postpone the sale and during the postponement to manage the property is valid or in excess of the power conferred on the donee. According to the construction of the power it was, I think, competent for the donee to modify the estate or interest in the realty given to the objects of the power by saying that it should be converted and held

(1) (1802) 6 Ves. 792.
(2) [1898] 1 Ch. 290.
(3) [1903] 1 Ch. 356.
(4) [1915] 1 Ch. 155.

as personalty and by appointing it in any reasonable or convenient manner that could be considered to be for their benefit.

Pit Bank Estate is a building estate of about 51 acres of which some two-thirds have been developed and let on chief rents. The other 17 acres remain undeveloped. According to the evidence there have existed since the death of the testator conditions rendering an immediate sale of the property very undesirable. So far as the land is developed the estimated decrease in the selling price since the days before the war is about 7000*l.* The undeveloped land is now worth some 5000*l.*, but it is estimated that if developed it might have an ultimate value of double that amount. In these circumstances it is obviously for the benefit of the objects of the power that the land should be retained, and the question is whether the donee has transgressed the limits of the power by conferring upon the trustees for sale these powers of retention, leasing and management.

In my opinion he has not. When once it is appreciated that the power to appoint an estate authorizes a sale and a gift of the produce of the estate, it follows, I think, that the authority extends to the conferring upon the trustees of all such powers as are reasonably ancillary to the trust for sale, such, for example, as the powers to postpone and in the meantime to manage.

Having regard to the nature of this estate I think I ought to answer both questions in the affirmative.

Solicitors: *Johnson, Weatherall, Sturt & Hardy, for Rowntree & Ritson, Oldham.*

H. C. G.

RUSSELL J.

1921

April 5, 6.

In re WICKSTED'S TRUSTS.

[1921. W. 025.]

Vendor and Purchaser—Person authorized to dispose of Land—Executor—Exception or Reservation of Minerals—Sanction of Court—Trustee Act, 1893 (56 & 57 *Vict. c.* 53), *ss.* 44, 50—*Trustee Act*, 1893, *Amendment Act*, 1894 (57 *Vict. c.* 10), *s.* 3—*Land Transfer Act*, 1897 (60 & 61 *Vict. c.* 65), *s.* 2, *sub-s.* 2.

An executor is within sub-s. 1 of s. 44 of the Trustee Act, 1893 (as amended by s. 3 of the Trustee Act, 1893, Amendment Act, 1894), which requires the sanction of the Court to a sale, by a "trustee or other person" authorized to sell land, of the land without the minerals or of the minerals separately from the residue of the land.

In re Cavendish and Arnold's Contract [1912] W. N. 83 not followed, and explained.

PETITION by Frederick George Mather, who was a sole executor appointed by the will of C. W. Wicksted, who died in 1906 (and, by amendment, directed at the hearing, Walter Somerville Gurney, who was surviving trustee of the will), praying that he (or the trustees or trustee for the time being of the will) might be at liberty to exercise all or any of the trusts, powers and authorities of the will so as to dispose of certain lands at Betley and elsewhere in Staffordshire then subject to the trusts of the will with an exception or reservation of the coals mines and minerals in and under the lands and the rights and powers of or incidental to the working getting or carrying away of the coals mines and minerals and to dispose of the coals mines and minerals with such rights or powers separately from the residue of the land and in either case without prejudice to any future exercise of the trusts powers and authorities with respect to the excepted coals mines or minerals or (as the case might be) the undisposed-of land.

By his will C. W. Wicksted, after appointing F. G. Mather sole executor, devised and bequeathed unto and to the use of two other persons, as trustees, all his freehold, customary freehold, copyhold and leasehold lands, hereditaments and premises other than those specifically devised and bequeathed

and including the lands at Betley and elsewhere in Staffordshire for a term of 1000 years upon trust as therein mentioned and subject thereto he devised and bequeathed the same to his wife's nephew, Hugh Gurney his heirs executors and administrators. The trusts of the term included a power of or trust for sale of the residuary real estate in aid of the residuary personal estate for payment of funeral and testamentary expenses and debts and legacies and duties. The residuary personal estate was given to Hugh Gurney absolutely.

The executor had not assented to the devise of the lands and hereditaments subject to the trusts of the will. He was a land and estate agent, and for many years up to the testator's death had, as agent, managed his estates, including the estate at Betley. The petition stated that the lands and hereditaments at Betley were suitable for agricultural and building purposes, and that the petitioner was selling parts thereof as occasion arose in discharge of the duties incident to his office as personal representative of the testator and to satisfy incumbrances on the testator's estate. He deposed that in his belief the estate would be realized to the best advantage in the interests of the persons beneficially interested under the will if the surface of the lands was sold separately from the minerals, and that the reservation of mines and minerals would not in any degree lessen the value of the surface for agricultural and building purposes and a much greater price could be obtained for surface and minerals sold separately than together.

Warwick Draper for the petition. The application is made under the jurisdiction given by sub-s. 1 of s. 44 of the Trustee Act, 1893 (as amended by s. 3 of the Trustee Act, 1893, Amendment Act, 1894), and s. 50 of the Act of 1893, which defines "trustee" so as to include an executor. (1)

(1) Trustee Act, 1893, s. 44, sub-s. 1: "Where a trustee is for the time being authorised to dispose of land by way of sale .... the High Court may sanction his so disposing of the land with an exception or reservation of any minerals, and with or without rights and powers of or incidental to the working, getting, or carrying away of the

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But the Court's attention ought to be drawn to a decision of Neville J. in *In re Cavendish and Arnold's Contract* (1), where it was held that an executor was not within the words "trustee or other person" in the amended s. 44, and that therefore it was not necessary for an executor who was selling the surface of land apart from the minerals to obtain the sanction of the Court.

[RUSSELL J. If that decision is right, the petitioner is not within s. 44 at all.]

That would be so. But the explanation of that decision is that the definition section (s. 50) seems to have been altogether overlooked. (2)

[RUSSELL J. If Neville J. was right, the petitioner has power to sell without coming to the Court. Does "authorised to dispose" in s. 44 mean authorized by some special instrument or authorized by law ?]

Authorized by law—here by sub-s. 2 of s. 2 of the Land Transfer Act, 1897. (3) There is nothing to restrict the

minerals, or so disposing of the minerals, with or without the said rights or powers, separately from the residue of the land."

Sect. 50: "In this Act, unless the context otherwise requires, ... the expressions 'trust' and 'trustee' include implied and constructive trusts, and cases where the trustee has a beneficial interest in the trust property, and the duties incident to the office of personal representative of a deceased person."

Trustee Act, 1893, Amendment Act, 1894, s. 3: "In section forty-four of the Trustee Act, 1893, after the word 'trustee' in the first two places where it occurs shall be inserted the words 'or other person.'"

(1) [1912] W. N. 83; 56 Sol. J. 468.

(2) It appeared, ex relatione the reporter of *In re Cavendish and Arnold's Contract* in the Weekly Notes, that s. 50 was not brought to the attention of Neville J. till after his decision and the publication of the reports in the Weekly Notes and Solicitors' Journal, and that, when he was informed of the definition contained in the section, he stated to the reporter that, although he would have arrived at the same conclusion in that particular case, he would have done so on different grounds; and he requested that the case should not be further reported.

(3) Land Transfer Act, 1897, s. 2, sub-s. 2: ". . . . and the powers, rights, duties, and liabilities of personal representatives in respect of personal estate, shall apply to real estate so far as the same are applicable, as if that real estate were a chattel vesting in them or him, save that it shall not be lawful for some or one only of several joint representatives, without the authority of the Court, to sell . . . . real estate."

meaning to a trustee authorized by the instrument creating the trust.

[RUSSELL J. I am not sure that the petition ought not to be served on the remainderman.]

In re Nagle's Trusts. (1) I now appear for the surviving trustee.

RUSSELL J. The petitioner has full power of sale conferred by virtue of sub-s. 2 of s. 2 of the Land Transfer Act, 1897, whereby "the powers, rights, duties, and liabilities of personal representatives in respect of personal estate" are made applicable to real estate. But a difficulty in this case arises out of the decision in *In re Cavendish and Arnold's Contract.* (2) There the surviving executor of a testator put up parts of the testator's real estate for sale by public auction in lots subject to particulars and conditions of sale, and one Arnold became the purchaser at the sale of lot 13. At the foot of the description of lot 13 in the particulars there was a note stating that all the minerals, except a stone quarry, were reserved; and the general stipulations annexed to the particulars stated that the vendor was selling as the surviving executor of the testator, and that, where against any lot the minerals were stated to be reserved, the mines and minerals were reserved with full powers, rights and easements to the vendor and his successors in title to search for, work, get and carry away the same, and with power to let down the surface, making due compensation for the same. The purchaser by one of his requisitions on title raised the point that the vendor could not sell the surface apart from the minerals without obtaining the sanction of the Court under s. 44 of the Trustee Act, 1893, as amended by s. 1 of the Trustee Act, 1894. The vendor relied on his powers as executor under sub-s. 2 of s. 2 of the Land Transfer Act, 1897, and, on the purchaser insisting on his objection, took out a summons under the Vendor and Purchaser Act, 1874, for an order that the requisition was sufficiently answered and that a good title was shown. Neville J.

(1) (1877) 6 Ch. D. 104. (2) [1912] W. N. 83; 56 Sol. J. 468.

RUSSELL J. 1921 WICKSTED'S TRUSTS, *In re.*

held that the jurisdiction of an executor over his testator's real estate for administrative purposes had been enlarged by sub-s. 2 of s. 2 of the Land Transfer Act, 1897, so that he now had the same power of dealing with it as he previously had over the personal estate for the purpose of paying the debts of the testator; that he had absolute power to sell the real estate, and could sell it in lots, and could sell the surface, reserving the minerals if he chose—that is to say, it was not necessary for him in exercising his power to come to the Court for its sanction under s. 44 of the Trustee Act, 1893; and that the phrase trustee "or other person" in s. 2 of the Confirmation of Sales Act, 1862, which was reproduced in s. 44 of the Trustee Act, 1893, as amended by the Trustee Act, 1894, did not include an executor. If that decision of Neville J. is to be followed this petition is unnecessary. But it is to be observed that neither in the note of the case in the Weekly Notes nor in the report in the Solicitors' Journal is there any reference made to indicate that s. 50, the definition section of the Trustee Act of 1893, which contains a definition of "trust" and "trustee," had been brought to the attention of Neville J. [His Lordship read the definition, beginning "the expressions 'trust' and 'trustee.'"] One cannot say that the clause is very satisfactorily or grammatically expressed, but it is clear, in my opinion, that the Legislature intended, when it used the words in s. 44, "where a trustee or other person is authorised to dispose of land by way of sale," and so on, to include a person in the position of a legal personal representative of a deceased person. Neville J.'s attention was not called to s. 50 by counsel so far as appears. I have sent for and looked at the registrar's book, and no mention of s. 50 is to be found there. In view of these facts I am unable to follow the decision in *In re Cavendish and Arnold's Contract* (1), and I hold that an executor in the position of the petitioner is within s. 44, and that it is necessary for him to come to the Court for its sanction to a sale of the land without the minerals. The trustees of the will are

(1) [1912] W. N. 83; 56 Sol. J. 468.

proper persons to be before the Court, and, one of them having died, the survivor should be made a co-petitioner by amendment. His name has been added to the brief of counsel for the petitioner, and I consider now that I can make the order asked for.

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Solicitors: *Bell, Brodrick & Gray.*

A. L.

MACCLESFIELD CORPORATION *v.* GOVERNORS OF FREE GRAMMAR SCHOOL OF KING EDWARD VI. IN MACCLESFIELD.

RUSSELL J. 1921 *May* 31; *June* 1, 2, 3.

[1918. M. 122.]

Local Government—Street—Frontagers—Notice to make up—Time for Work—Time fixed by Highway Committee—Validity—Sufficiency—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 150, 317, *Sch. IV., Form G.*

In July, 1912, a corporation gave notice under s. 150 of the Public Health Act, 1875, to the defendants as frontagers in two streets in the borough requiring them to make up those parts of these streets on which their premises abutted within three calendar months. The notices were not complied with and the Corporation did the work. The defendants having failed to pay their proportion of the cost of making up the roads, the Corporation now claimed a declaration that the defendants' respective premises were charged under s. 257 of the Act with the amounts. The defendants contended that the notices were invalid, because (1.) the period of three calendar months had not been fixed after consideration by the Corporation, and (2.) the time specified was not reasonably sufficient.

The evidence was that at a meeting of the Highway Committee to the Borough Council on April 25, 1912, it was resolved that the Town Clerk be instructed to serve notice under s. 150 on the respective frontagers in (inter alia) the two streets. This resolution was approved and confirmed by the Borough Council on May 1, 1912. No time within which the work was to be executed having been determined by these resolutions, the Town Clerk sent the Borough Surveyor the notices with the time left blank. The Borough Surveyor then consulted the Highway Committee, who, after an informal discussion, decided on three calendar months as a reasonably sufficient time. The notices were then issued with this time specified, without any reference of the matter to the Council. Evidence was also adduced on the question whether the time allowed was reasonably sufficient:—

Held, (1.) that as the effect of the resolution of May 1 was that the Corporation sanctioned the issue of notices mentioning a reasonable

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time, there was no objection to the Corporation leaving it to a competent person to fix that time;

(2.) that if a reasonably sufficient time was named in the notices directed to be issued, the manner in which the specification of that time was determined was immaterial; and

(3.) that in considering whether the period allowed was reasonable, regard should be had to the work to be done by the particular frontagers and not to the whole work to be done in the road, but that on either view the time allowed was reasonably sufficient.

Dictum of Swinfen Eady L.J. in *Bristol Corporation* v. *Sinnott* [1918] 1 Ch. 62, 71 explained.

WITNESS ACTION.

The defendants were at all material times the owners of lands and premises in the borough of Macclesfield fronting, adjoining and abutting on Leigh Street and Joddrell Street.

On July 12, 1912, the plaintiffs as the urban sanitary authority of the borough under the Public Health Act, 1875, served under s. 150 of the Act on the owners and occupiers of all premises fronting, adjoining or abutting on certain parts of Leigh Street, Joddrell Street and Cawley Street, including the defendants, notices of that date requiring the owners and occupiers respectively within three calendar months from the date thereof to sewer level pave flag and channel those parts of these streets on which their respective premises fronted, adjoined or abutted. Each notice referred to plans and sections deposited for inspection at the office of the plaintiffs in accordance with which the work was to be done.

These notices were not complied with and accordingly the plaintiffs themselves executed the work, and on May 7, 1915, served on the defendants notices that the proportion of the expenses of executing the work payable by the defendants in respect of their four several premises fronting, adjoining or abutting on Joddrell Street was 121*l.* 16*s.* 5*d.*, 84*l.* 2*s.* 3*d.*, 183*l.* 4*s.* 5*d.*, and 141*l.* 15*s.* 3*d.* and in respect of their premises fronting, adjoining or abutting on Leigh Street, 57*l.* 15*s.* 3*d.*

Demands for payment of these sums were served on May 30, 1917, and as the defendants failed to pay them the plaintiffs commenced these proceedings on January 25,

1918, claiming a declaration that these several sums with interest at 5 per cent. from May 30, 1917, were by virtue of s. 257 of the Public Health Act, 1875, respectively a charge on the defendants' respective premises in Joddrell Street and Leigh Street.

Three defences were set up by the defendants at the hearing :—

(1.) That the roads in question were at the date of the service of the notices in 1912 highways repairable by the inhabitants at large ;

(2.) That the notices of July 12, 1912, were invalid, because the period of three calendar months specified for the execution of the work in the notices had not been fixed after consideration by the Borough Council ; and

(3.) That in any case the time specified by the notices as that within which the work was required to be executed was not reasonably sufficient as regards either Joddrell Street or Leigh Street.

No sufficient evidence was adduced at the trial to show that the roads were in July, 1912, repairable by the inhabitants at large and no report is required of this part of the case.

The following are the material facts established in reference to the second ground of defence. At meetings of the Highway Committee to the Borough Council held on January 25, 1912, and April 11, 1912, the Committee approved plans, sections and estimates submitted by the Borough Surveyor for the sewering, forming and making up of Joddrell Street and Leigh Street respectively. At a meeting of the Highway Committee on April 25, 1912, plans, sections and estimates relating to Cawley Street were also approved.

The minutes of the meeting then proceeded as follows :—

"The plans, sections and estimates prepared by the Borough Surveyor for the sewering, forming and making of the following streets, viz.,

	£	s.	d.
Joddrell St., Estimated cost	1397	6	10
Leigh St. ,, ,, ...	555	11	9
Cawley St. ,, ,, ...	214	6	0

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having been approved by this Committee, it was resolved that the Town Clerk be and he is hereby instructed to serve notices under section 150 of the Public Health Act, 1875, on the respective owners and occupiers of premises fronting, adjoining or abutting on Joddrell St., Leigh St. and Cawley St. requiring them to sewer, form, make, etc., such streets. . . . ."

The Borough Council considered this resolution and confirmed and approved it on May 1, 1912. The evidence showed that what happened afterwards was that the Town Clerk sent the Borough Surveyor the notices with the time left blank and asked him how long it would be reasonable to allow in the notices for the execution of the work. The Borough Surveyor then consulted the Highway Committee who after an informal discussion decided on three calendar months as a reasonable time, although no formal resolution was passed to that effect. The notices were filled up accordingly and issued without the question of the time to be allowed having been referred to the Borough Council.

The evidence material to the third ground of defence is sufficiently stated in the judgment.

Tomlin K.C. and *Dighton Pollock* for the plaintiffs. In a notice to make up a street given to frontagers under s. 150 of the Public Health Act, 1875, it is necessary that the time stated should be reasonably sufficient. There is evidence here to show that the period of three months specified was ample. If that be so, the Court cannot go behind the notice and inquire if the Corporation actually considered the period of time to be specified and fixed it. Certainly it need not appear on the minutes of the Council that this was so.

Clauson K.C. and *J. Scholefield* for the defendants. The notices in question here were invalid, because the time specified in them was never considered and fixed by the Council: compare Sch. IV., Form G, to the Public Health Act, 1875, which has effect as part of the Act by virtue of s. 317. In *Bristol Corporation* v. *Sinnott* (1) it was decided

(1) [1917] 2 Ch. 340; [1918] 1 Ch. 62, 71.

that the time specified must be reasonably sufficient and in the Court of Appeal Swinfen Eady L.J. said that it was for the local authority to fix a reasonable time. The Council could not delegate the duty of fixing the time, and the act of the Highway Committee in fixing it was not sufficient and could not be rendered valid by any subsequent ratification: *Rex* v. *Chapman* (1); *Bowyer, Philpott & Payne, Ld.* v. *Mather* (2); *St. Leonards Vestry* v. *Holmes.* (3)

Again the time specified was not in fact reasonably sufficient for the work to be executed. This is a pure question of fact, and it would make no difference that the Council thought it reasonable if in fact it were not. The evidence shows the time to be insufficient for the whole work in each road when allowance is made for the necessary delay in commencing the work due to the need for consultation between frontagers, the obtaining of tenders for the work to be done and such matters.

Tomlin K.C. in reply. Sect. 150 of the Public Health Act, 1875, is in no sense a penal section. It merely enables the Council to do work that the frontagers are under a statutory duty to do and to recover the cost from them. The only requirement in reference to the time to be specified is that it should be reasonable. It is not for the Court to investigate how the time came to be specified, if in fact it is reasonable. But in any case the evidence shows that the notices were the Corporation's notices. The effect of the resolution of May 1 was to make the Highway Committee's resolution of April 25 the resolution of the Council, and it follows that anything done in pursuance of that resolution by the proper officers of the Council was the act of the Council.

In considering whether the time allowed was reasonably sufficient, the defendants have treated the question as on the footing that the time must be reasonably sufficient for the execution of the whole work in each road. This is incorrect. Each frontager is liable only to do the work

(1) [1918] 2 K. B. 298. (2) [1919] 1 K. B. 419.
(3) (1885) 50 J. P. 132.

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on the piece of road of which he is the owner and it is the time for doing that work which has to be specified: compare Sch. IV., Form G, to the Act.

RUSSELL J. [after stating the three grounds of defence relied on by the defendants and deciding, as regards the first of these, that the evidence showed that no one of the streets in question was a highway repairable by the inhabitants at large at the dates when the notices under s. 150 of the Public Health Act, 1875, were served on the frontagers, continued:] I now come to the second ground of defence, which is that no time was ever fixed or determined by the Council themselves, and, accordingly, that the time specified in the notices was not a time fixed or determined by the Council. The facts, as proved in evidence before me, are as follows: The matter of making up these three streets—that is to say, Cawley Street, Leigh Street and Joddrell Street—came, in the first instance, not before the Council themselves, but before the Highway Committee of the Council, and on April 25, 1912, the Highway Committee passed a certain resolution. [His Lordship read the resolution as set out above and continued:] Down to that point it is a resolution that the Town Clerk should serve notices under s. 150, which would, if there was nothing else in the resolution, carry with it an instruction to the Town Clerk to serve such notices, specifying the time, and upon the authorities that means specifying a reasonable time; but the subsequent part of the resolution makes it quite clear that the time was in the contemplation of the Highway Committee, because it continues: "That in connection with the above-mentioned streets the Borough Surveyor be instructed to get out specifications and bills of quantities, so that tenders can be invited for carrying out the work when the time stated in the notices has expired, if the work has not been commenced by the property owner." That resolution was passed on April 25, 1912, by the Highway Committee. The matter came before the Council on May 1 following, and the Council approved that minute. The result of that was,

in my opinion, as if on May 1, 1912, the Council had passed a resolution in exactly these words—that is, a resolution by the Council authorizing the Town Clerk to serve notices under s. 150 specifying a reasonable time for the doing of the work. They left it to the Town Clerk to fill in certain details, including a reasonable time, and, upon the evidence before me, that appears to be their practice. The Town Clerk, acting with perfect discretion and with perfect propriety, approached the Council's Surveyor with a view to ascertaining what would be the proper time to insert in the notices the Council had authorized him to serve. The Surveyor, in his turn, quite properly brought the matter before the attention of the Highway Committee, and the Highway Committee, after deliberation and discussion, although no formal resolution was passed, decided that three months was a proper time to insert in the notices in respect of the contemplated works; and that period was accordingly inserted in the notices by the Town Clerk. [His Lordship read the evidence establishing these facts and continued:] It is said that the notice was bad, because the Council, as such, did not themselves fix the time. The suggestion is that unless the Council fixed the time they would not under s. 150 be requiring the frontagers to do the work within a specified time. Of course, this argument proceeds upon the assumption that the time in fact inserted in the notice was a reasonable time. I will read the section: "Where any street within any urban district (not being a highway repairable by the inhabitants at large) or the carriage way footway or any other part of such street is not sewered levelled paved metalled flagged channelled and made good or is not lighted to the satisfaction of the urban authority, such authority may, by notice addressed to the respective owners or occupiers of the premises fronting adjoining or abutting on such parts thereof as may require to be sewered levelled paved metalled flagged or channelled, or to be lighted, require them to sewer level pave metal flag channel or make good or to provide proper means for lighting the same within a time to be specified in such

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notice." The section does not in terms require the Council to fix the time. All it requires is that the time should be specified in the notice, and by this the section, as construed by the authorities, means that a reasonable time must be specified in the notice. Those two requirements—first, that the time is to be specified in the notice, and secondly, that the time is to be a reasonable time—completely protect the frontagers. That being so, there is no reason outside the words of the Act itself for reading the section, as I am in truth invited to do, as though it ran " within the time fixed by the Council, and to be specified in such notice." It appears to me that the true reading of the section is that provided the notice contains a time specified which is in fact a reasonable time, it is immaterial to consider the source from which the time was derived.

Reliance was placed upon *Bristol Corporation* v. *Sinnott* (1), where the facts were these. The local authority had served notices upon the frontagers, and the time within which the works included in the notices had to be done was one calendar month. Objection was taken that one calendar month was a wholly unreasonable time, and the Court found as a fact that one calendar month was a wholly unreasonable time, or, to use the words of Neville J., " was grossly insufficient." It turned out, in the course of that case, that nobody had ever considered what amount of time was required in the circumstances of the case; not only had the Council themselves not considered it, but nobody had considered it at their request or by their direction. The Town Clerk had simply put in one month as an arbitrary time, because that was his recognized custom. It had no reference whatever to the works contemplated by the notice. In those circumstances Neville J. held that the time being unreasonably short, or, to use his words again, grossly insufficient, and the section requiring a reasonable time to be specified in the notice, the provisions and requirements of the section had not been complied with, and the notice was a bad notice. His decision was affirmed by the Court of

(1) [1917] 2 Ch. 340; [1918] 1 Ch. 62, 71.

Appeal, and, as I read the judgments, upon the same grounds, but in the course of delivering his judgment Swinfen Eady L.J. used this phrase, and it really is upon this passage, which is dictum and nothing but dictum, that this defence to this action is based. He first of all says this (1): "The position, therefore, is this: The local authority served a notice requiring the frontagers to execute the work within a time which was not reasonably sufficient for the work to be executed, but was wholly insufficient having regard to the nature, character, and extent of the work. Is that a sufficient notice in compliance with the statute? In my opinion, it is not." There we have his decision, and the ground of his decision. Then he considers what an authority ought to do, and in the course of doing so he uses this phrase: "The authority must consider the nature and extent of the work and, having regard to the circumstances, the time which ought fairly and reasonably to be allowed for the completion of that work." He nowhere states that the authority may not leave that to a competent person under them to decide. There is nothing in the decision and nothing in the language used either in the Court below or in the Court of Appeal to suggest, much less to decide, that a notice, in which the time specified was in fact reasonable, would be invalid, by reason of the method in which the extent of time was arrived at. Really, upon this part of the case, the question which I have to ask myself, and which I have to decide, is this: Was the notice which was served the notice of the Council? Was it the notice authorized by the Council? In my opinion, it was. Was the requirement to do the work within three months the Council's requirement? In my opinion, it was, and none the less so because the detail of filling in the precise amount of reasonable time was left to the Town Clerk to be inserted by him, according to his practice, after consultation with the Surveyor and, if necessary, the Highway Committee. In my opinion, this ground of defence to this action fails.

(1) [1918] 1 Ch. 71.

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There remains only this further question: Whether in point of fact the time so specified in the notice—namely, three calendar months—was a reasonable time in the circumstances. Upon that question of fact I have no doubt in my own mind. After hearing all the evidence, I have no hesitation in deciding that the three months constituted, in the circumstances, a reasonable time. I have had called before me, first of all, the former surveyor, Mr. Baggott, who said he had formed the opinion as an expert that two months was a reasonable time in which the work should be done; but the notice went far beyond that and specified three months. Then he, like the other witnesses, was cross-examined with considerable minuteness. He was asked to allow a certain number of days for the frontagers to make up their minds whether they should consult a surveyor and solicitor, and perhaps counsel also, and so by a thorough cross-examination of that sort a period of time was obtained by a computation and addition of days here and days there which would bring up the total period to a period in excess of three months; but notwithstanding that cross-examination the witness still adhered to his view that three months was an ample time. Again Mr. Bowen, who is an independent surveyor and surveyor to the borough of Wimbledon, said he thought three months was a reasonable time. He too was cross-examined with minuteness. He thought the actual execution of the work should take from ten to twelve weeks, and he was then cross-examined as to whether the same preliminaries would not take a few more days, and again it was sought to be shown by adding up the number of days mentioned by him in his evidence that the three months' period was unreasonable. Again, he adhered to his view, and said if he was one of those frontagers he would consider three months perfectly reasonable; he said he fixed his time as the time necessary for each particular frontager to do his part of the work. He said he had had experience of work on a much larger scale than this, and he never found three months other than a reasonable time. Then Mr. Scorgie, who is the Borough Surveyor, with a very large experience,

to the borough of Hackney, was called. He is at present in charge of some 110 miles' length of roads. He went into the matter with great clearness. He examined the plans and estimates in this particular case, and examined the work involved in the execution of the plans and estimates, and also prepared tables showing the work to be done in each particular street to assist him in computing the time in which the work could be done. He also deals with the matter from what I consider the correct point of view, the frontagers' point of view, with respect to the work to be done in that part of a street on which each frontager's premises abut. He took the biggest frontagers of all, the defendants in this action. He said from these frontagers' point of view he would specify two months from the service of the notice as sufficient for doing the work. The three months in the notice would be ample, in his opinion. He says the whole work in all the three streets should be finished in ten weeks and that the period of three months in the notices is a generous allowance of time. He also was cross-examined about preliminaries, and I think I can summarize the result of his cross-examination. He conceded that perhaps if you were to take into account preliminaries you might concede another twenty days as a generous period, which would be exhaustive; but even so there still remains a goodly margin in respect of the three months. The only witness called by the defendants was a gentleman named Mr. Jabez Wright. He took a very different view. Upon the whole I do not think he is a person who would be given to undue haste in any respect. His evidence stands alone. He went so far as to say the real and proper time for doing the work was twelve months; he started with nine but said he would prefer to have twelve. Upon that evidence I have no difficulty in making up my mind which way the truth lies. I do not mean to suggest that Mr. Jabez Wright said anything other than what he believed to be correct; but upon the question of fact whether the notice was a reasonable notice or not, I decide, upon this evidence, that the time specified in the notice was a reasonable time within the

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section. Reliance has been placed upon the fact, that in the contract to do the bulk of the work, the time specified was somewhat less than three months—namely, from January 20 to April 12—which is only some eight days short of three months. And it is said that you must infer that three months for the whole of the work is insufficient and unreasonable. I do not take that view. It does not follow that because April 12, 1914, is the date stipulated in the contract, after which if the work were not completed penalties were to be paid, the work is not capable of being done in a shorter time. Nor is it material to consider that the contract includes only part of the work. It includes the greater part, the fact being that a small portion of the sewering which was of an urgent character was done under another contract which allowed some fifteen days. There is no reason why the fifteen days should not have run concurrently with the time specified in the main contract. The defendants have approached the matter from the point of view that the time to be specified under the section is the time which will be required for the whole of the work to be executed. Upon the construction of the section I do not take that view. It seems to me that when the section provides that the authority may require the frontagers to do the work within a time specified that means the work upon that portion of the street upon which the particular frontagers' property abuts. It would be entirely unreasonable to attribute to the Legislature an intention of enabling the local authority to require A. to do work on the property of B.; and that this was not the intention of the Legislature is, to my mind, made clear by the form of notice contained in the Fourth Schedule to the Act. This form of notice, which by s. 317 is made part of the Act, is in these terms: "Whereas the said street is not sewered," and so on, "to the satisfaction of the above-named [*local authority*], and whereas your said premises front, adjoin, or abut on certain parts of the said street which require to be sewered levelled paved flagged and channelled: Now, therefore, the said [*local authority*] hereby give you notice (in pursuance of the Public Health Act,

1875), to sewer level pave flag and channel the same within the space of [*state the time*] from the date hereof. . . . ." "The same" there grammatically and obviously refers to the parts of the street upon which the premises of the person on whom the notice is served abut. Therefore, in my opinion, the true view of the section is that in considering the reasonableness of the time you must consider the time required for the frontager to do the particular work which he is called upon to do; but even if I am wrong upon that, I am still of opinion on the evidence before me that, treating the work as a whole, three calendar months was a reasonable time.

That is the last remaining ground of defence to this action, and, in my opinion, all the grounds of defence fail, and the plaintiffs are entitled to the relief which they ask. Accordingly, I make a declaration as asked, that the particular sums in question are charges upon the particular properties, and I will order the defendants to pay the plaintiffs' costs of the action.

Solicitors: *Sharpe, Pritchard & Co.; Rawle, Johnstone & Co., for A. C. Procter, Macclesfield.*

H. C. G.

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June 24.

HOLLIES STORES, LIMITED *v.* TIMMIS.

[1921. H. 1335.]

Landlord and Tenant—Lease—Option to renew on same Terms—Death of One of Three Guarantors of Rent—Failure of Option.

By a lease dated March 20, 1914, a lessor demised a house to a company for the term of seven years at a yearly rent of 60*l.*, and the company and three named persons jointly and severally covenanted for payment of the rent reserved. The lease contained a proviso that if at the expiration of the term the company should be desirous of taking the premises on a further lease for seven years and should give six calendar months' previous notice in writing of their decision, the lessor should grant to the company a further lease for seven years, "Such lease to contain clauses so far as possible identical with the terms hereof, including the covenant" by the three named guarantors "for payment of rent thereby reserved." One of the guarantors having died in 1917, the company, six months before the termination of the lease, gave the required notice and offered another guarantor in the place of the guarantor who had died, or to make a deposit, or to pay the seven years' rent in advance. The personal representatives of the lessor refused to grant the lease on the ground that the terms on which it was to be granted had become incapable of performance:—

Held, that the effect of the proviso was that the new lease was to contain a covenant by the three guarantors to pay the rent. That having become incapable of performance the landlords could not be compelled to grant a different lease, even though the rent were equally well secured.

Finch v. *Underwood* (1876) 2 Ch. D. 310 applied.

By a lease dated March 20, 1914, and made between Caroline Timmis (the lessor) of the first part the Hollies Stores Ld. (the lessees) of the second part and John Dowty Bussey Frank John Cowen and John William Cozens of the third part the lessor demised to the lessees a shop and dwelling house 52 Newhampton Road West, Wolverhampton, for a term of seven years from March 25, 1914, at the yearly rent of 60*l.* payable quarterly on the usual quarter days. The lease contained the following covenant: "The lessees and the said John Dowty Bussey Frank John Cowen and John William Cozens hereby jointly and severally covenant with the lessor in manner following that is to say that they will pay the rent hereby reserved at the times and in manner

aforesaid." Then followed the usual repairing and other covenants on the part of the lessees and a provision that the lessor should permit the lessees at any time during the continuance of the term to convert the drawing-room into a sale shop. Later in the lease there was the following proviso: "Provided also that if at the expiration of the first five years or at the expiration of the term hereby granted the lessees shall be desirous of taking the said premises on further lease for a further period of seven years therefrom they shall be entitled to do so giving to the lessor six calendar months' previous notice in writing of their desire in that behalf and in the event of such notice being given the lessor shall grant to the lessees a further lease of the said premises for the said term of seven years such lease to contain clauses so far as possible identical with the terms hereof including the covenant by the said John Dowty Bussey Frank John Cowen and John William Cozens for payment of rent thereby reserved." There was a provision that when the context allowed the expression "the lessor" should include the heirs and assigns of Caroline Timmis.

In 1917 John William Cozens died. In September, 1920, Caroline Timmis died. The lessees duly gave six calendar months' previous notice in writing that they desired a further seven years' lease, and offered to supply a responsible guarantor instead of John William Cozens. They also offered to deposit 500*l.* or more if that were considered inadequate in 5 per cent. National War Bonds or alternatively to pay the whole seven years' rent in advance on the granting of the new lease.

As the legal personal representatives of Caroline Timmis refused to grant a lease, the lessees brought an action against them claiming specific performance of the proviso to the original lease by the grant of a new lease for seven years. By consent it was ordered that the following point of law should be separately argued—namely, whether the defendants were on the true construction of the above lease and in the events which had happened bound to grant a new lease for seven years.

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Ashton Cross for the lessees. It is for the defendants to say why they are not bound to grant a lease.

Dighton Pollock for the defendants. The lessees have no legal right to a renewal of the lease, as the condition that the three guarantors of the rent shall be parties cannot be complied with owing to the death of one of them. The condition is a condition precedent to the lessees' right to a renewal, and the defendants cannot be compelled to grant a lease on any other terms: *Sheffield Corporation* v. *Sheffield Electric Light Co.* (1); *Finch* v. *Underwood.* (2)

Ashton Cross. The aim and object of a covenant must be looked at when it is being construed: *Hyde* v. *Skinner.* (3) Here the object was to secure the rent payable by joining in the covenant for payment the three named persons, who were in fact the directors of the lessee company. The offers of the company give complete security. Further, on the construction of the proviso the words "so far as possible identical" apply to all the terms of the new lease, including the covenant by guarantors. We have offered a guarantee "so far as possible identical" and the defendants are bound therefore to grant the lease. Indeed there is nothing else in the lease to which the words "so far as possible identical" seem appropriate.

[RUSSELL J. There is the provision that the lessor should permit the alteration into a shop. If that had been done, the new lease could not contain this provision.]

RUSSELL J. [after stating the facts and reading the proviso in the lease continued:] The effect of the proviso as matter of construction appears to be that the lease to be granted was to contain so far as possible clauses identical with those in the lease, and that one of the provisions to be inserted was a covenant by John Dowty Bussey, Frank John Cowen and John William Cozens to pay the rent reserved. The position that has been taken up by the defendants as the lessor's personal representatives is that the contract is

(1) [1898] 1 Ch. 203. (2) 2 Ch. D. 310.
(3) (1723) 2 P. Wms. 196.

incapable of performance, because no lease granted to the company can contain a covenant by the three named persons as contemplated by the proviso. The company on the other hand has made every possible endeavour to induce the defendants to grant them a new lease. They have offered to supply a respectable and responsible guarantor in the place of John William Cozens, who is dead. In addition they have offered to make a deposit of securities to the value of 500*l.*, and they have also offered to pay the whole of the seven years' rent in advance. The landlords have taken their stand on what they allege to be their strict legal rights and refuse to grant the lease.

The case has been argued before me with singularly little assistance in the way of authority. Only one of the cases cited, *Finch* v. *Underwood* (1), has any real relevance. The headnote to that case is: "A lease was granted to two, with a proviso for re-entry in case the rent should be in arrear for thirty days, or the tenants or either of them should become bankrupt, or let, assign, or part with the premises, or any part thereof, without licence; or if the tenants should not keep the covenants (which were joint and several covenants), one of which was to keep the interior of the property in repair. The landlord covenanted that he would, at the expiration of the term (in case the covenants on the tenants' part should have been duly performed), grant to 'the tenants, their executors and administrators,' a fresh lease, subject to the same covenants, provided the tenants or either of them, their or either of their executors or administrators, should, twenty days before the end of the term, give the landlord notice of the desire to take such lease. One of the tenants became bankrupt, shortly before which he assigned his interest in the lease to the other tenant. The landlord, with knowledge of this, received rent to the end of the term. The continuing tenant, twenty-one days before the end of the term, gave the landlord notice to grant the renewed lease to him. At this time the interior of the property required repairs to the amount of at least 13*l.* Malins V.-C. decided

(1) 2 Ch. D. 310.

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that the lease must be granted, the repairs required being only trifling." The matter then went to the Court of Appeal, where a different view was taken—namely, that the granting of a new lease was subject to a condition precedent that the covenants of the lease should have been kept and that as the covenant to keep in repair had not been observed when the new lease was applied for, the landlord was not obliged to grant a new lease. The Court of Appeal held also that "the agreement being to grant a lease to the two, who must enter into joint and several covenants, and both being alive, the landlord could not be called upon to grant a lease to one only." In his judgment James L.J., after pointing out that the case was one of condition precedent, continued (1): "A renewal of a lease is a privilege to which the tenant is to be entitled in certain circumstances and on certain terms. The covenant here was that on the request of either of the tenants the landlord would (the covenants of the lease having been duly kept) grant a renewed lease to the two. I am of opinion that the lessor is entitled to say that, as there were two tenants in the original lease who entered into joint and several covenants, and his agreement was in terms to grant the renewed lease to the two subject to the same covenants, he is entitled to have the joint and several covenants of the two in the renewed lease." It appears to me that I can apply that passage to the present case and say that as three named guarantors entered into joint and several covenants in the original lease, and as the agreement was to grant a new lease with the same guarantors, the landlords are entitled to insist on the joint and several covenant by these guarantors before they will grant a new lease. Then James L.J. proceeds: "We need not enter into the question how the case would stand if one of the lessees had died." It appears to me that the same principle applies, and that a landlord who has agreed to grant a new lease containing certain provisions is not bound to execute a different document. It is immaterial whether that different document is a lease to one instead of two tenants or a lease containing a guarantee by two instead

(1) 2 Ch. D. 314, 316, 317.

of three persons. As James L.J. said: "The lease which the lessor agreed to grant is not the same kind of lease as is asked for by this bill." Mellish L.J. says: "The tenant must take the covenant to renew as he finds it." Then he deals with the condition precedent that the covenant to keep the premises in repair should have been complied with and proceeds: "Then as regards the persons to whom the lease was to be granted. The proviso for forfeiture on alienation without licence strengthens the conclusion drawn from the terms of the covenant itself, that the lease was to be granted only to both the tenants. Whether, if one died, the survivor would be entitled to claim the benefit of the covenant, is a question on which I have not made up my mind; nor is it necessary to do so, for both tenants are living, and one of them has committed a forfeiture by assigning to the other." And in conclusion the learned judge says: "But under the covenant to renew, the tenant can only ask for such a lease as the landlord covenanted to grant, namely, a lease to both tenants." Baggallay J.A. was of the same opinion. He said: "By the terms of the covenant the notice might be given by the tenants, or either of them, but the lease was to be granted to the two. The notice was given by one, and required the lease to be granted to that one. It was said that this might be looked upon as an application for a proper lease, and that the other lessee would concur in accepting it. There is no evidence that he is willing to do so, nor do I think this the proper construction of the notice. Thirdly, was the landlord bound to grant a lease in accordance with the notice? I am of opinion that he was not. He could not be bound to grant a lease to one."

In my opinion the landlords are entitled here to stand on their strict rights and to say that their only obligation is to execute a new lease containing a covenant by the three named persons to pay the rent. That cannot be given owing to the death of one of them, and they are not bound to accept any other person as a substitute, or a deposit, or even a payment of the entire rent in advance which might complicate the accounts they are obliged to keep.

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I decide accordingly that the defendants are not on the true construction of the lease and in the events which have happened bound to grant a fresh lease.

Solicitors: *Charles Everett, for G. R. Thorne, Sons & Co., Wolverhampton; Maude & Tunnicliffe, for Stirk & Co., Wolverhampton.*

H. C. G.

SARGANT J. 1921 *March* 10.

In re HUGHES.

HUGHES *v.* FOOTNER.

[1920. H. 4035.]

Will—Construction—Power of Appointment among Class to Third Person—Power to settle Shares.

A testator appointed H. H. his executor and trustee, and gave him all his estate, "upon trust for all my children and their issue in such shares and in such manner as I shall by codicil direct or appoint, or, failing any such direction or appointment by me, then in such shares as . . . . the said H. H. shall in his discretion think fit and proper." Testator never made a codicil, and left children, grandchildren, and a great-grandchild:—

Held, (1.) that the children and their issue living at the death of the testator were entitled to the estate, subject to the power of selection given to H. H.; and (2.) that the power so given to him was not confined to directing in what shares members of the class were to take, but that he could place any share in settlement.

The principle of *Brown* v. *Higgs* (1799) 4 Ves. 708 and (1803) 8 Ves. 561, and the statement of the settled law in Davidson's Precedents, 3rd ed., vol. iii., Part I., p. 155, adopted.

FREDERICK HUGHES made his will, dated February 23, 1919, in the following words (omitting formal parts): "In the first place, I revoke all previous wills heretofore made by me. Secondly, I appoint my cousin Henry Hughes, of 7 Arthur Street, London Bridge, London, Solicitor, to be the sole executor and trustee of this my will. Thirdly, I give to the said Henry Hughes All my estate, both real and personal, and of whatsoever nature or kind the same may be, To hold the same unto the said Henry Hughes, Upon

trust for all my children and their issue in such shares and in such manner as I shall by codicil direct or appoint, or, failing any such direction or appointment by me, then in such shares as my cousin, the said Henry Hughes, shall in his discretion think fit and proper."

The testator died on April 1, 1919, without having executed any codicil.

He left surviving him six children only—namely, the defendants (to the summons referred to below) Ella Footner (married but without issue), Amelia Hughes (of unsound mind, but not so found), Louisa Hughes (spinster), Lilian Smith (married), Francis Burdett Hughes and James Day Hughes.

Lilian Smith had four children (all living at the testator's death)—namely, the defendants David Hughes Smith, Lawrence Hughes Smith, Margaret Hughes Smith, and Francis Hughes Smith, all infants.

Francis Burdett Hughes, by his marriage had seven children (all living at the testator's death)—namely, the defendants Elizabeth Hull (married), Lilian Hughes, Mabel Hughes, Margaret Hughes, Francis Edward Hughes, Arthur Burdett Hughes, and Frederick Thomas Hughes.

Elizabeth Hull was a widow, with one child, the defendant Lilian Elizabeth Hull, who was living at the testator's death.

James Day Hughes, by his marriage, had one child—namely, the defendant Frederick Edward Hughes, who was living at the testator's death.

No issue of the testator's children had been born after his death.

Henry Hughes, the executor, took out an originating summons raising the questions (1.) whether the will operated as a valid disposition of the residuary estate among all the testator's children and their issue (*a*) living at his death, or (*b*) living at his death or born in the plaintiff's lifetime, in such shares as the plaintiff should appoint, or whether the residuary estate was undisposed of; (2.) whether, if the will operated as a valid disposition, the residuary estate would be divisible, in default of appointment by the plaintiff, equally

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among (*a*) all the testator's children and their issue living at his death, or (*b*) among the said children and their issue, including therein any issue born after the testator's death in the plaintiff's lifetime, or among what persons and in what shares the same would be divisible; (3.) whether, if the plaintiff had a power to appoint amongst the children and their issue, he could appoint in such manner as he thought fit amongst the said class, or whether he could only direct the shares in which the estate was to be divided among the same class, and whether the power could be exercised from time to time; (4.) whether, if the plaintiff had power to appoint, the income of the residue accrued prior to the appointment was divisible equally among (*a*) the children and issue of the testator living at his death, or (*b*) living at his death or born in the plaintiff's lifetime, or among what persons and in what shares the same was divisible.

All persons interested on any construction whether as next of kin or otherwise were parties to the summons, and desired to have the questions decided.

Farwell for the plaintiff stated the facts and the questions raised by the summons.

Preston K.C. and *Attwater* for the defendant Francis Burdett Hughes (the heir at law). If the testator had given his property in favour of a class in such shares as a third person might appoint, the gift would have been valid; but he has attempted to delegate to a third person a mere power of disposition over his property, and the law does not permit this: *Houston* v. *Burns*. (1) Here the gift is too indefinite, as the class intended to be benefited is not sufficiently indicated, and, there being no gift in default of appointment, such a gift will not be implied: *In re Eddowes* (2); Farwell on Powers, 3rd ed., pp. 528, 536, r. 6; Jarman on Wills, 6th ed., p. 651. The discretion given to the donee of the power to exercise or not to exercise it is fatal, for there is then no trust in favour of the class: *In re Weekes' Settlement*. (3)

(1) [1918] A. C. 337, 342. (2) (1861) 1 Dr. & Sm. 395.
(3) [1897] 1 Ch. 289.

[They also referred to *Bernard* v. *Minshull* (1), *Brown* v. *Higgs* (2), and *In re White's Trusts.* (3)]

Jenkins K.C. and *P. F. S. Stokes* for the defendant Lilian Smith (a daughter of the testator). The class is not determined by the testator using the words "for all my children and their issue"; the class is to be determined by Henry Hughes. Apart from anything further, the class which would take would be those living at the testator's death, but that class is liable to be extended by the trustee exercising the power in favour of a wider class—namely, issue of the children born after the testator's death but in the lifetime of Henry Hughes.

[They referred to Farwell on Powers, 3rd ed., p. 558, and *Cole* v. *Wade.* (4)]

Ward Coldridge K.C. and *Swords* for the defendant. J. D. Hughes (a son of the testator) adopted the last argument.

Rolt K.C. and *H. A. Rose* for the defendants Elizabeth Hull, Lilian Hughes, Mabel Hughes, Margaret Hughes, Frances E. Hughes, Arthur B. Hughes and Frederick T. Hughes (all grandchildren of the testator) and Lilian Elizabeth Hull (the only great-grandchild). If the argument on behalf of the heir at law is right, all the cases cited in Farwell on Powers, 3rd ed., p. 525, were wrongly decided. The gift of a power to appoint does not alter the class: *In re Weekes' Settlement.* (5)

Galbraith K.C. and *W. R. Sheldon* for the defendant Louisa Hughes (a daughter of the testator). The case is within the rule stated in Farwell on Powers, 3rd ed., p. 534, as follows: "If the instrument itself gives the property to a class, but gives a power to A. to appoint in what shares and what manner the members of that class shall take, the property vests until the power is exercised in all the members of the class, and they will all take in default of appointment." Where, as in this case, definite objects are pointed out, and a discretion is given to a third

(1) (1859) John. 276.
(2) 4 Ves. 708; 8 Ves. 561.
(3) (1860) John. 656.
(4) (1807) 16 Ves. 27.
(5) [1897] 1 Ch. 289.

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person to distribute among the objects, the gift to them does not fail: *In re Douglas* (1); *Longmore* v. *Broom.* (2) Only those living at the time of the testator's death can take.

[They also referred to Hawkins on Wills, 2nd ed., pp. 90, 91; and *In re Master's Settlement.* (3)]

Roby K.C. and *W. J. Whittaker* for the defendants Ella Footner and Amelia Hughes (children of the testator); and *A. Grant K.C.* and *Mossop* for Frederick E. Hughes (a grandchild).

Farwell. As I represent the unborn children, I am bound to contend that those who are born in Henry Hughes' lifetime are within the class among whom he may appoint.

SARGANT J. [after stating the facts]. The first question to be decided is whether the disposition by the will is so vague that it must be held to fail, and, if it does not fail for that reason, what is the class among the members of which the testator's cousin, Henry Hughes, is given a power of selection.

The general law on the subject is well settled, and is that the power of testamentary disposition is essentially a personal one and cannot be exercised by a will merely purporting to delegate to another the distribution of the testator's estate and the ascertainment of the objects of his bounty. But there are some real or apparent exceptions to or qualifications of this general rule. One is that of the creation of a general power which the donee may exercise for his own benefit, for such a power is equivalent to property. Another is that of the creation of a power of distribution amongst charities. A third is that of the creation of a power of selection amongst individuals or a class of individuals who are pointed out as the beneficiaries: see *Houston* v. *Burns.* (4) Does the present will come within this third head of exception or qualification?

In my opinion it does. The general principles applicable to this third head are to be found in the judgment of Lord

(1) (1887) 35 Ch. D. 472, 485.
(2) (1802) 7 Ves. 124.
(3) [1911] 1 Ch. 321.
(4) [1918] A. C. 342–3.

Eldon in *Brown* v. *Higgs*. (1) There the testator devised real estate to his nephew John Brown upon certain trusts, and directed him to employ the ultimate surplus of the rents "to such children of my nephew Samuel Brown as my said nephew John Brown shall think most deserving and that will make the best use of it, or to the children of my nephew William Augustus Brown, if any such there are or shall be." The trustee John Brown died in the lifetime of the testator, and it was held that the gift enured for the benefit of all the children of Samuel Brown and William Augustus Brown living at the death of the testator. The most material passages in the judgment are at pp. 570 and 574 of the report in 8 Vesey, and are as follows: "It is perfectly clear, that, where there is a mere power of disposing, and that power is not executed, the Court cannot execute it. It is equally clear, that, wherever a trust is created, and the execution of that trust fails by the death of the trustee, or by accident, the Court will execute the trust. . . . . But there are not only a mere trust and a mere power, but there is also known to the Court a power, which the party, to whom it is given, is intrusted and required to execute; and with regard to that species of power the Court considers it as partaking so much of the nature and qualities of a trust, that if the person, who has that duty imposed on him, does not discharge it, the Court will, to a certain extent, discharge the duty in his room and place." And again at p. 574: "The principle is . . . . that if the power is a power, which it is the duty of the party to execute, made his duty by the requisition of the will, put upon him as such by the testator, who has given him an interest extensive enough to enable him to discharge it, he is a trustee for the exercise of the power, and not as having a discretion, whether he will exercise it, or not; and the Court adopts the principle as to trusts; and will not permit his negligence, accident, or other circumstances, to disappoint the interests of those, for whose benefit he is called upon to execute it."

With regard to powers of this description the rule to be

(1) 4 Ves. 708; 8 Ves. 561, 570, 574.

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derived from *Brown* v. *Higgs* (1) and other similar cases is stated, and in my judgment concisely and accurately stated, in Farwell on Powers, 3rd ed., p. 258, in the following language: "If there is a power to appoint among certain objects but no gift to those objects and no gift over in default of appointment, the Court implies a trust for or gift to those objects equally if the power be not exercised."

The general nature of the power here seems to be indistinguishable from that in *Brown* v. *Higgs* (1), but the actual gift here is somewhat different from the gift there. That gift was for such of the class as the donee of the power might select, while here the gift is in its terms for the whole class with a super-added power merely to ascertain shares. The difference in language may not now affect the actual extent of the power, when regard is had to the legislation on the subject of exclusive and non-exclusive powers, but it may nevertheless have a considerable effect on the construction of the document. So far however as this is concerned, the difference tends in favour of an implied gift to the members of the class equally, since it obviously diminishes the extent of the implication necessary for the purpose. In my opinion, the present case, while falling generally within the principle of *Brown* v. *Higgs* (1) and the rule already quoted from Farwell on Powers at p. 528, falls also within the rule stated on p. 534 of the same work—namely, "If the instrument itself gives the property to a class, but gives a power to A. to appoint in what shares and what manner the members of that class shall take, the property vests until the power is exercised in all the members of the class, and they will all take in default of appointment."

It was argued that the class to take was undefined in this sense, that, as the power of selection extended to issue and might have been exercised at any time after the testator's death during the life of the donee of the power, with the effect of extending the power to issue born after the testator's death, the classes did not correspond—that is to say, there were two different classes, the class among which the selection

(1) 4 Ves. 708; 8 Ves. 561.

might be made being larger than the class to take in default of selection. But the effect of adding a power of selection among a class already defined is to limit that power of selection within the ambit of that class—namely, the class of children and issue determined at the testator's death. And, by virtue of that power to select among that defined class, there is an implied gift to all the members of the class in the event of the power not being exercised.

Accordingly, I hold that the will is a valid disposition of the testator's residuary estate among all his children and their issue existing at his death in such shares as Henry Hughes shall appoint; and further that until appointment the income belongs to the members of the class equally.

The third question raised by the summons was then argued.

Roby K.C. and *W. J. Whittaker* for the defendants Ella Footner and Amelia Hughes. There is no power in Henry Hughes to appoint exclusively. The power is a non-exclusive one, and the Acts 11 Geo. 4 and 1 Will. 4, c. 46, and 37 & 38 Vict. c. 37, dealing with illusory appointments, do not affect questions of construction: *In re Deakin.* (1)

Rolt K.C. and *H. A. Rose; Jenkins K.C.* and *P. F. S. Stokes;* and *A. Grant K.C.* and *Mossop,* all for grandchildren. There is a marked difference between the power of appointment which the testator reserves to himself, and that which he gives to Henry Hughes. The latter has only power to direct in what shares the property shall be taken by members of the class. No power is given to him, like that reserved to the testator himself, to distribute "in such manner" as he shall think fit.

Galbraith K.C. and *W. R. Sheldon* for the defendant Louisa Hughes. The difference between the words reserving the power to the testator and the words of the power given to Henry Hughes is too slight to divert from the latter the ordinary rule of construction. In Davidson's Conveyancing, 3rd ed., vol. iii., Part 1., p. 155, it is stated to be settled that (at all events as to personal estate) a power to appoint to

(1) [1894] 3 Ch. 565.

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children in any proportion enables the donee of the power to settle a share. The cases referred to by the author—namely, *Phipson* v. *Turner* (1), *Alexander* v. *Alexander* (2), and *Alloway* v. *Alloway* (3)—fully support his proposition.

[They also referred to *Wilson* v. *Wilson.* (4)]

SARGANT J. The next question is whether Henry Hughes has power only to appoint aliquot shares of the capital, or whether the power extends so far as to enable him to settle a share—in other words, to put it in an illustrative manner, whether the distribution must be made horizontally only or may also be made vertically. Mr. Roby indeed suggested that there was no power to appoint exclusively. But the statute 1 Will 4, c. 46, provided that no appointment should be impeached on the ground of being illusory, and since, in consequence of the statute 37 & 38 Vict. c. 37, the difference between exclusive and non-exclusive powers has ceased to exist.

The more serious objection is whether, upon the construction of the will, Henry Hughes is authorized to settle a share. When I first considered the will I was inclined to think that the difference between the language used as to an appointment by the testator and that used as to an appointment by Henry Hughes pointed to this, that Henry Hughes was intended to have a less extensive power than the power which the testator intended to reserve to himself, the latter being "in such shares and in such manner," whereas the power given to Henry Hughes was "in such shares" as he should think proper. And I confess that I did not at first realize how far the authorities had gone in the direction of authorizing a division vertically.

It is very material, in construing this will, to consider the state of the family at the date of the will. There were then living six children, twelve grandchildren, and a great-grandchild of the testator, and he clearly contemplated that

(1) (1838) 9 Sim. 227.
(2) (1755) 2 Ves. Sen. 640.
(3) (1843) 4 D. & War. 380, 387; 2 Con. & Law. 509, 514.
(4) (1855) 21 Beav. 25; 25 L. T. (O. S.) 211.

he himself should have power to appoint among them by way of settling a share. He then seems to have realized the possibility of his not making any appointment by codicil, and he proceeded to provide against such a contingency by saying that in this case his estate should go "in such shares as my cousin Henry Hughes shall in his discretion think fit." I think he intended that his cousin should have power to benefit any one of the three generations, and that he did not intend by the language he used to draw a distinction between the two powers. In an informal instrument of this kind he may easily have dropped out the words "in such manner," in describing the power he was giving to his cousin, for the sake of brevity and to avoid repetition, and not by way of contrast.

Having regard then to the state of the family, I do not consider the fuller words used in describing the first power of appointment as affording a sufficient reason for restricting the power given to Henry Hughes. It is important to have regard to long-established rules, especially where a word or phrase may have been accepted as having a wide meaning. As regards the general view of the profession, I have been referred to Davidson's Precedents, 3rd ed., vol. iii., Part I., p. 155, where the learned author says: "It has, however, long been settled that (at all events as to personal estate) a power to appoint to children in any proportion enables the donee to appoint for such estates and with such cross-limitations as he thinks fit." And *Phipson* v. *Turner* (1), *Alexander* v. *Alexander* (2), and *Alloway* v. *Alloway* (3) are cited as authorities. All these three cases and *Wilson* v. *Wilson* (4) have been cited before me, and I think they justify me in giving a wide meaning to the word "shares," so as to enable Henry Hughes to appoint a share by way of settlement, or to appoint a partial interest. Henry Hughes has, in my judgment, power to determine not only the amounts of the shares, but also the nature of the interests to be taken in those amounts. The appointments

(1) 9 Sim. 227.
(2) 2 Ves. Sen. 640.
(3) 4 D. & War. 380, 387.
(4) 21 Beav. 25.

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may be made from time to time, but they must be confined to the objects of the power—namely, the children and their issue living at the testator's death.

Solicitors for the plaintiff: *Robinson & Bradley.*

Solicitors for the defendants: *Robinson & Bradley; H. M. Gowing, for Harold Mayhew, Birmingham; Bell, Brodrick & Gray, for Woodhouse, Chambers & Co., Hull; W. H. Martin & Co., for G. A. Weston, Kidderminster.*

F. E.

Considered. GIBSON *v.* SOUTH AMERICAN STORES [1950] 1 Ch. 177

SARGANT J. 1921 *March* 17; *April* 12.

In re PEEL'S RELEASE.

[1920. P. 1264.]

Charity—Gift in Perpetuity—Gift Over to Individuals—Cy près Doctrine—Scheme.

P. in 1837 by deed granted and released an acre of land to trustees, upon trust to permit the same to be "for ever thereafter" used as and for a place for the instruction of seventy poor children resident within the parish "in the principles of the Church of England as by law established, and in reading, writing, casting accounts and other proper, useful and common learning for poor children." The deed also provided that if, by any law or statute or otherwise, the release should, as to the charitable purposes thereby intended to be made and established, "either not take effect, or, having taken effect, shall afterwards cease or determine or be defeated, or, the precise objects of these presents being for the education of poor children in the principles of the Church of England, become prevented," then the trustees for the time being should stand seised of the land and the school-house, if any, to be built thereon in trust for P., his heirs and assigns. By a codicil to his will P. provided for raising a sum of money for building a school-house on the land, the balance to be applied as an endowment for the school for the payment of the schoolmaster and schoolmistress. P. died in 1838, and after his death the school-house was built, and a sum of money stood invested in the names of the present trustees of the deed, representing the money set apart by P. for the maintenance and support of the school. The school was carried on until about 1920, but the income of the fund was insufficient for the maintenance of the schoolmistress; the scholars' attendance was very small; and the school was practically derelict through the income being insufficient to enable it to be carried on:—

Held by Sargant J. (who had already decided that the trustees had acquired a good title under the Statute of Limitations and could not set up any objection to their own title) that the event contemplated by the

clause of reverter had arisen, but that the clause was void as a perpetuity, and that, the original gift being expressed to be perpetual, there could be no reverter or resulting trust to P.'s heir or personal representatives, either of the school and site or of the endowment fund; and he directed a scheme to be prepared.

In re Bowen [1893] 2 Ch. 491 followed.

In re Randell (1888) 38 Ch. D. 213 and *In re Blunt's Trusts* [1904] 2 Ch. 767 distinguished.

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ROBERT PEEL, by a deed of release of April 20, 1837, granted and released a certain acre of land to trustees, including himself, upon trust to "permit and suffer the same to be for ever thereafter used as and for a place for the instruction of 70 poor children, videlicet 30 male and 40 female children, resident within the said Parish of Llandilofawr, in the principles of the Church of England as by law established, and in reading, writing, casting accounts and other proper, useful and common learning for poor children." The deed also provided that "if, by reason of any law or Statute of the Realm, or otherwise, it shall happen that the release hereby made of the said piece or parcel of land and hereditaments shall, as to the charitable purposes hereby intended to be made and established, either not take effect, or, having taken effect, shall afterwards cease or determine or be defeated, or, the precise object of these presents being for the education of poor children in the principles of the Church of England, become prevented, then and from thenceforth the trustees for the time being of these presents shall stand and be seised of the said piece or parcel of land and hereditaments hereby released and the school-house and buildings, if any, to be built thereon, in trust for the said Robert Peel, his heirs and assigns." By a codicil (also dated April 20, 1837) to his will the settlor provided for raising 2000*l.* to be applied in building a school-house on the land released, the balance of which was to be applied as an endowment for the school for the payment of the schoolmaster and schoolmistress.

The settlor died on June 13, 1838, and after his death the school-house was erected, and 2393*l.* stood invested in the names of the present trustees of the deed, representing the money set apart by R. Peel for the maintenance and support

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of the school. The school was carried on until recently in accordance with the deed, but the income of the fund, 66*l.* per annum, was insufficient to provide for the maintenance of the schoolmistress. The attendance at the school was very small, and the school was practically derelict in the sense that there was not sufficient income to enable it to be carried on.

The trustees of the deed took out an originating summons asking for the direction of the Court whether they ought to release to H. L. Peel, who was the heir at law or assign of the settlor, in fee simple or in tail, or as claiming under the residuary legatee of R. Peel, or otherwise, the school and the site thereof and the endowment fund free from any trusts, or how otherwise they should deal with the school, land and fund.

H. M. Broughton for the plaintiffs stated the facts and the questions raised by the summons.

H. O. Danckwerts for the Attorney-General. The reverter clause in the deed of April 20, 1837, is void as being contrary to the rule against perpetuities. It might have been within *In re Randell* (1) and *In re Blunt's Trusts* (2), if it had been a gift terminable, or a limited gift over with an executory gift over to take effect in certain events; but those cases are distinguishable, as here there is an out-and-out gift to a charity, with an executory gift over, and there can be no reversion in or resulting trust to the donor, but it can only come to him under a special clause in the deed, which here is void as a perpetuity: Gray on Perpetuities, 2nd ed., para. 603. As there is a charitable gift in perpetuity, followed by a gift over of a future interest to arise on an event which need not necessarily happen within the limits allowed by the rule against perpetuities, the gift over fails: *In re Da Costa* (3); *In re Hollis' Hospital Trustees and Hague's Contract.* (4) The trustees are still seised in fee and both the land and the endowment ought to be applied cy près under a scheme.

(1) 38 Ch. D. 213.
(2) [1904] 2 Ch. 767.
(3) [1912] 1 Ch. 337.
(4) [1899] 2 Ch. 540.

J. W. F. Beaumont for the defendant H. L. Peel. The reverter clause is, no doubt, too remote and against the rule against perpetuities, but on its construction it operates indirectly to prevent any cy près application of the property and prescribes that the property shall be used for charitable purposes only so long as the selected denominational education can be given there. And, as this is now impossible, the indicated period of dedication to charitable purposes has elapsed, and there is a resulting reverter to the donor independently of the reverter clause. The rule against perpetuities does not affect a resulting trust, which can take effect although the reverter clause is void: *In re Randell* (1); *In re Bowen* (2); and *In re Blunt's Trusts.* (3) There was no intention of the donor that the cy près doctrine should be applied after the express trust had ended, and there is no dedication after that trust has ceased to exist: Halsbury's Laws of England, vol. iv., p. 197. A contrary intention, either express or implied, in a deed prevents the cy près doctrine from applying. Here the donor has said that on the happening of certain events the school is not to be continued, and the cy près doctrine is not applicable: *Mayor of Lyons* v. *Advocate-General of Bengal.* (4) [He also referred to *Corbyn* v. *French.* (5)]

Edwardes Jones for residuary legatees. I adopt the argument on behalf of the defendant H. L. Peel. It may be added that the deed operated under the School Sites Act, 1841, or its predecessor, the School Sites Act, 1836. There was, therefore, a statutory reverter to the donor and those claiming under him.

[*Attorney-General* v. *Shadwell* (6) was also referred to.]

Cur. adv. vult.

April 12. SARGANT J. When this summons was before me originally I dealt shortly with two aspects of the matter.

(1) 38 Ch. D. 213.
(2) [1893] 2 Ch. 491.
(3) [1904] 2 Ch. 767.
(4) (1875) 1 App. Cas. 91.
(5) (1799) 4 Ves. 418.
(6) [1910] 1 Ch. 92.

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In the first place, I held that it was unnecessary to inquire whether the deed of release of April 20, 1837, was void by reason of its containing a clause of reservation in favour of the grantor. For the trustees had undoubtedly held possession under the deed from its date to the present time, and had, therefore, acquired a good title under the Statutes of Limitation at any rate; and, of course, they could not set up any objection to their own title. And, in the second place, I considered to some extent the provisions of the deed, in view of certain indications which had been held out, that the parties concerned might agree by way of compromise to some variation of the deed such as the Court could properly sanction.

As the result of such examination I came to the conclusion that the purpose disclosed by the deed was the narrower of the two intentions that had been suggested—that is to say, that the purpose was education strictly and solely in accordance with the principles of the Church of England; and accordingly that, so long as the scheme for the benefit of denominational education of this type was possible, no scheme for undenominational education could be sanctioned. But my actual words, as reported in the shorthand notes, certainly appear to go further than this, and to amount to a rejection of the possibility of any scheme of undenominational education, not only so long as a scheme for the benefit of denominational education was practicable, but finally and absolutely. This, however, was never my intention, and the ambiguity is, no doubt, due to my observations having been of an interim nature, and not carefully considered and worded. I was not prejudging a question which was not then before me, and on which I had not then heard any argument.

The suggested compromise has now broken down, and the matter has to be dealt with strictly. It is clear that the event contemplated by the terms of the clause of reverter has arisen, and that, in the existing circumstances, the precise object of the deed — namely, the education on the site and in the school-buildings of poor children in the principles of the Church of England — has "become

prevented." What are the legal consequences of that state of things?

On the part of the Attorney-General it is argued that, however limited the character of the expressed educational purposes of the deed, the dedication to those purposes is in terms perpetual; that the clause of reverter to the donor is an equitable executory limitation which is obviously void as exceeding the limits of perpetuity; and that accordingly the land and buildings in question, as well as the subsequent testamentary endowment, must be dealt with and administered cy près by the machinery of a scheme. *In re Bowen* (1) is, perhaps, the most important decision to this effect; but there is, of course, a long series of previous authorities in the same general direction.

On the part of the other defendants it is admitted that the clause of reverter is too remote, and cannot operate in accordance with its strict terms. But it is contended that the expressions in this clause operate indirectly and by way of construction to forbid any cy près application of the premises, and to prescribe that they shall be used for the purposes of charity only so long as the selected denominational education can be given there. This being no longer possible, it is said that the indicated period of dedication has elapsed; that there is a resulting reverter to the donor independently of the positive operation of the actual clause; and that the cases of *In re Randell* (2) and *In re Blunt's Trusts* (3) apply.

No distinction is drawn on either side between the trusts of the deed as to the site and the trusts of the will as to the endowment. It is admitted that any decision as to the site must be equally applicable to the endowment. But Mr. Edwardes Jones, on behalf of those interested in the personal estate of the donor and testator, submitted an additional subsidiary argument to the effect that the deed operated under the School Sites Act, 1841, or rather its legislative predecessor, the School Sites Act, 1836, and that

(1) [1893] 2 Ch. 491. (2) 38 Ch. D. 213.
(3) [1904] 2 Ch. 767.

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there was accordingly a statutory reverter to the donor and those claiming under him.

This subsidiary argument I will deal with at once. It is not in my judgment sound. The Acts in question were Acts to enable school sites to be granted in fee by tenants for life, trustees, and other owners who were otherwise debarred from doing so. The donor here was an owner in fee who had no need to have recourse to any such legislation, and showed no intention of dealing with the site in question otherwise than by virtue of his ownership. There is no reference in the deed to any Act of the kind. It would be entirely unsound to construe, as operating under legislation framed to meet special cases, an assurance which needs no assistance from and contains no reference to any such legislation.

The main argument against the Attorney-General has more substance; but, nevertheless, when closely examined, seems to me opposed both to principle and to authority. The ratio decidendi, both in *In re Randell* (1) and in *In re Blunt's Trusts* (2), undoubtedly was that the original gift to charity was expressed to be for a limited period only, and that, therefore, a reversion was necessarily left in the donor. In the present case the original gift was expressed to be perpetual. There could, therefore, be no reversion left in the donor, and any interest could only come to him, as it was expressed to come, by a substantive gift operating by way of positive curtailment and destruction of the original gift. This curtailing and destroying gift being in itself bad in law, as it is acknowledged to be, there is not, in my judgment, any room for construing the document in a manner contrary to its expressed operation for the purpose of validating a prohibited limitation. The mere fact that the object aimed at might have been attained in another manner—namely, by an original gift for a limited period only—is, in my opinion, immaterial. In the words of Stirling J. in *In re Bowen* (3): "The question which I have to decide, therefore, appears to me to reduce itself to one of the construction of the testator's will—i.e.,

(1) 38 Ch. D. 213. (2) [1904] 2 Ch. 767.
(3) [1893] 2 Ch. 491, 495.

whether the testator has given the property to charity, in perpetuity, subject to an executory gift in favour of the residuary legatee, or whether he has given it for a limited period, leaving the undisposed of interest to fall into residue. In construing the will the rule to be applied is that stated by Lord Selborne in *Pearks* v. *Moseley*. (1) 'You do not import the law of remoteness into the construction of the instrument by which you investigate the expressed intention of the testator. You take his words, and endeavour to arrive at their meaning, exactly in the same manner as if there had been no such law, and as if the whole intention expressed by the words could lawfully take effect. I do not mean, that, in dealing with words which are obscure and ambiguous, weight, even in a question of remoteness, may not sometimes be given to the consideration that it is better to effectuate than to destroy the intention; but I do say, that, if the construction of the words is one about which a Court would have no doubt, though there was no law of remoteness, that construction cannot be altered, or wrested to something different, for the purpose of escaping from the consequences of that law.' "

In my judgment the present case is within the principle enunciated in *Pearks* v. *Moseley* (1), and is completely covered by the decision, in *In re Bowen* (2), of a judge of great eminence and specially conversant with cases of this character. And to hold otherwise would be to strike at the foundation of the cy près doctrine as applied in a long succession of cases of high authority.

It is to be observed that the present is the case of an established charity which has endured for some eighty years; it is not one of that class of cases of initial failure to which somewhat different considerations apply.

I decide, therefore, that none of the defendants other than the Attorney-General has any interest in the endowment in question, and that a scheme must be directed in the usual way. The defendants, other than the Attorney-General, have no interest in the settlement of the scheme, and all proceedings

(1) (1880) 5 App. Cas. 714, 719. (2) [1893] 2 Ch. 491.

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should be stayed as against them. The costs of all parties, as between solicitor and client, will be paid and retained by the plaintiffs out of the endowment.

Solicitors for all the parties except the Attorney-General: *Warrens, for G. C. Porter, Llandilo.*

Solicitor for the Attorney-General: *The Treasury Solicitor.*

F. E.

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[1920. M. 1039.]

War—Emergency Legislation—Alien Enemy—Enemy Debt—Action by Controller—Trading with the Enemy (Amendment) Act, 1916 (5 & 6 *Geo.* 5, *c.* 105), *s.* 1, *sub-ss.* 1, 3, 10; *s.* 4—*Trading with the Enemy (Amendment) Act*, 1918 (8 & 9 *Geo.* 5, *c.* 31), *s.* 3, *sub-s.* 3—*Treaty of Peace Order*, 1919, *s.* 1, *sub-ss. i., ii., iii.*—*Treaty of Peace with Germany, Part X., ss. III., IV., Arts.* 296, 297 *and Annexes—Construction—*"*Exceptional war measures.*"

The provisions of art. 296 of the Peace Treaty with Germany, which declared that enemy debts as therein defined were to be settled through clearing offices to be established after the Treaty came into operation, and the annex to that article, are qualified by art. 297, and the provisions of the latter article and its annex cannot be construed as limited to a confirmation of what has been done under "exceptional war measures" before the coming into force of the Treaty, but must be held to validate all acts and procedure done thereafter in the execution of such exceptional war measures:—

Held, therefore, that an action brought four months after the coming into force of the Peace Treaty by the controller with the sanction of the Board of Trade, in the name of enemy subjects formerly carrying on business in London, to recover assets of the business alleged to be in the hands of the defendant, was properly brought; and a motion by the defendant to stay the proceeding on the ground that it was prohibited by the provisions of the Peace Treaty was dismissed.

MOTION.

This was a motion by the defendant for an order to stay all further proceedings in the action on the ground that it was a proceeding to recover an enemy debt as defined in para. 2 of the annex to art. 296 of the Treaty of Peace

between the Allied and Associated Powers and Germany, and was accordingly prohibited by para. 1, sub-s. iii., of the Treaty of Peace Order, 1919; or, alternatively, that the statement of claim might be struck out on the ground that it disclosed no reasonable cause of action. The following statement of the material facts is taken from the judgment of the Court.

"By an order of the Board of Trade dated November 23, 1918, and made In the matter of The Trading with the Enemy (Amendment) Act, 1918, and In the matter of the business formerly carried on by Arnold Otto Meyer & Co., after recitals that Arnold Otto Meyer & Co. carried on the business of merchants and agents at London House, Crutched Friars, London, but had then ceased to carry on such business; and that it appeared to the Board that the said business whilst carried on was carried on wholly or mainly for the benefit of, or under the control of enemy subjects, or of persons who subsequently became enemy subjects, the Board, in exercise of the powers conferred on them by sub-s. 3 of s. 3 of the Act of 1918—and of all other powers them thereunto enabling, thereby ordered that the assets of the said business should be realized and distributed, and appointed Mr. Geoffrey Bostock, of 21 Ironmonger Lane, chartered accountant, as controller to control and supervise the carrying out of that order, and to conduct the realization and distribution of the assets of the business; and thereby conferred upon the said controller, subject to such special directions as the Board might from time to time give, amongst other powers, powers "(1.) to get in and collect all moneys owing to or held for or on behalf or on account of the said business, or the proprietor or proprietors thereof"; "(7.) With the consent of the Board to apply to the High Court or a Judge thereof to determine any question in the carrying out of this Order or any claim against, or in respect of the assets of the said business"; and "(8.) To apply to the Board for permission to do any other act or thing incidental to or necessary for the realisation or distribution of the assets of the said business, or to confer such other

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power or powers on the Controller as may be expedient." It was not suggested that in the circumstances the making of that order was not within the statutory powers of the Board under the sub-section therein referred to, and in the Act of 1916, with which the Act of 1918 is to be construed as one (see s. 14 of the Act of 1918), it is provided by sub-s. 10 of s. 1 that an order made under that section shall continue in force notwithstanding the termination of the war, until determined by order of the Board of Trade.

By sub-s. 4 of s. 3—under which the order of November 23, 1918, was made—the provisions of s. 1 of the Act of 1916 relating to orders made under that section apply to orders made under s. 3 of the Act of 1918 in like manner as they apply to orders made under s. 1 of the Act of 1916. The result is that the order of November 23, 1918, continues in force until determined by order of the Board.

The Treaty of Peace was signed at Versailles on June 28, 1919, and came into force on January 10, 1920. The controller with the sanction of the Board commenced this action on May 3, 1920. The original defendant was one Augustus George Faber, and by the writ and statement of claim the controller, who instituted the action in the name of Arnold Otto Meyer & Co. alone, but who was himself added as co-plaintiff on July 29, 1920, claimed to recover from A. G. Faber a sum of 4087*l.* 2*s.* 11*d.* and other moneys and chattels alleged to be assets of the business in the hands of Faber at the date of the order of November, 1918. Faber refused to pay, alleging that he had cross-claims against the business to an amount which would make him a creditor and not a debtor of the business.

Faber died in October, 1920, and the present defendant, R. W. Elder, is his legal personal representative, against whom the ordinary order to carry on proceedings has been made."

Clayton K.C. and *Heckscher* for the defendant. This action by the plaintiffs is a proceeding for the recovery of an enemy debt payable before the war by a national of

one of the contracting Powers residing within its territory to a national of an opposing Power residing within its territory, as defined in art. 296, s. 1, of the Peace Treaty (1) or

(1) The material parts of the Treaty of Peace Order, 1919, and the Schedule thereto with ss. III. and IV. of Part X. of the Treaty, containing arts. 296 and 297 and their annexes, are as follows:—

Under the Treaty of Peace Order of August 18, 1919, made under the Treaty of Peace Act, 1919.

1. "The sections of the treaty set out in the Schedule to this Act shall have full force and effect as law, and for the purpose of carrying out the said sections the following provisions shall have effect" (inter alia):—

(i.) "There shall be established in the United Kingdom a clearing office under the control and management of such person (hereinafter referred to as the controller) as the Board of Trade may appoint for the purpose . . . .";

and in the event of a local office being established the provisions relating to the clearing office thereinafter contained were to apply thereto for the purpose of the functions authorized to be performed by a local clearing office under para. 1 of the annex to s. III. of Part X. of the Treaty.

(ii.) "It shall not be lawful for any person to pay or accept payment of any enemy debt except in cases where recovery thereof in a Court of law is allowed as hereinafter provided, otherwise than through the clearing office, and no person interested in any such debt as debtor or creditor shall have any communications with any other person interested therein as creditor or debtor except through or by leave of the clearing office. . . . ."

(iii.) "It shall not be lawful for any person to take proceedings in any Court for the recovery of any enemy debt except in the circumstances provided under paragraphs 16, 23 and 25 of the Annex to the said Section III."

SCHEDULE.

Section III. of Part X. of the Treaty —Debts.

Art. 296: "There shall be settled through the intervention of clearing offices to be established by each of the High Contracting Parties within three months of the notification referred to in para (*e*) hereafter the following clauses of pecuniary obligations:—

Sect. 1: "Debts payable before the war and due by a national of one of the Contracting Powers, residing within its territory, to a national of an opposing Power, residing within its territory."

Sect. 2: "Debts which become payable during the war to nationals of one Contracting Power residing within its territory and arose out of transactions or contracts with the nationals of an opposing Power, resident within its territory, of which the total or partial execution was suspended on account of the declaration of war."

Sect. 4: "Capital sums which have become payable before and during the war to nationals of one of the Contracting Powers in respect of securities issued by one of the opposing Powers. . . . ."

"The settlements provided for in this Article shall be effected according

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alternatively a debt which became payable during the war, as mentioned in s. 2 of that article.

to the following principles and in accordance with the Annex to this section."

Para. (*a*): "Each of the High Contracting Parties shall prohibit, as from the coming into force of the present Treaty, both the payment and the acceptance of payment of such debts, and also all communications between the interested parties with regard to the settlement of the said debts otherwise than through the clearing offices."

Para. (*e*) provided that the provisions of art. 296 should not apply as between Germany on the one hand and any one of the Allied or Associated powers, their colonies, protectorates or dominions on the other hand unless, within one month from the deposit of the ratifications of the Treaty by the Power in question, notice to that effect was given to Germany by the Government of such Allied or Associated Power.

ANNEX.

Sect. 1: "Each of the High Contracting Parties will, within three months from the notification provided for in Article 296, para. (*e*), establish a clearing office for the collection and payment of enemy debts. Local clearing offices may be established for any particular portion of the territories of the High Contracting Parties. . . ."

Sect. 2: "In this Annex the pecuniary obligations referred to in the first paragraph of Article 296 are described as 'enemy debts,' the persons from whom the same are due as 'enemy debtors,' the persons to whom they are due as 'enemy creditors.' . . ."

Sect. 3 is quoted verbatim in the judgment.

Sect. 16 provided for the case where two clearing offices were unable to agree whether a debt claimed was due or in case of a difference between an enemy debtor and an enemy creditor in which cases the dispute was to be referred to arbitration or to a mixed arbitral tribunal as thereafter provided.

Sect. 23 provided that where by decision of the clearing offices or the mixed arbitral tribunal a claim was held not to fall within art. 296 the creditor should be at liberty to prosecute the claim before the Courts.

SECTION IV.

Property, Rights and Interests.

Art. 297, para. (*a*): "The exceptional war measures and measures of transfer (defined in par. 3 of the Annex hereto) taken by Germany with respect to the property, rights and interests of nationals of Allied or Associated Powers, including companies and associations in which they are interested, when liquidation has not been completed, shall be immediately discontinued or stayed, and the property, rights and interests concerned restored to their owners. . . . ."

Para. (*b*). "Subject to any contrary stipulations which may be provided for in the present Treaty, the Allied and Associated Powers reserve the right to retain and liquidate all property, rights, and interests belonging at the date of the coming into force of the present Treaty to German nationals, or companies controlled by them, within their territories, colonies, possessions, and protectorates, including territories ceded by them by the present Treaty. The liquidation shall be carried out in accordance with the

All debts coming within these categories are to be settled by the clearing offices established by each of the high contracting parties, and the payment and acceptance of payment of all such debts and settlement of the same otherwise than through such clearing offices is prohibited by s. 4, para. (*a*), of the same article. Further, by ss. 16 and 23 of the annex to this article a special tribunal is set up to determine disputes between two clearing offices unable to agree and otherwise as therein mentioned. The commencement of this present action after the coming into force of the Peace Treaty and its continuation is therefore contrary to the terms of art. 296, and its annex.

Art. 297, we submit, is limited to a confirmation of what has been done under what are called "exceptional war

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laws of the Allied or Associated State concerned. . . . ."

Para. (*d*): "As between the Allied and Associated Powers or their nationals on the one hand and Germany or her nationals on the other hand, all the exceptional war measures, or measures of transfer, or acts done or to be done in execution of such measures as defined in paragraphs 1 and 3 of the Annex hereto, shall be considered as final and binding upon all persons except as regards the reservations laid down in the present Treaty."

In the annex to this article it was provided:—

Sect. 1: "In accordance with the provisions of Article 297, par. (*d*), the validity of vesting orders and of orders for the winding up of businesses or companies, and of any other orders, directions, decisions, or instructions of any Court or any department of the Government of any of the High Contracting Parties made or given, or purporting to be made or given, in pursuance of war legislation with regard to enemy property, rights, and interests is confirmed. . . . ."

Sect. 3: "In Article 297 and this Annex the expression 'exceptional war measures' includes measures of all kinds, legislative, administrative, judicial, or others, that have been taken or will be taken hereafter with regard to enemy property, and which have had or will have the effect of removing from the proprietors the power of disposition over their property. . . . . Acts in the execution of these measures includes all detentions, instructions, orders, or decrees of Government departments or Courts applying these measures to enemy property, as well as acts performed by any person connected with the administration or the supervision of enemy property, such as the payment of debts, the collection of credits, the payment of any costs. . . . ."

Sect. 9: "Until completion of the liquidation provided for by Article 297, par. (*b*), the property, rights, and interests of German nationals will continue to be subject to exceptional war measures that have been or will be taken with regard to them."

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measures" before the Peace Treaty came into force, and does not operate to validate future acts done in execution of exceptional war measures. The principle we contend for was applied in *In re Nierhaus* (1) where Russell J. discussed the provisions of arts 296 and 297. Other cases bearing on the same subject are *In re National Bank für Deutschland* (2) and *In re Deutsche Bank* (*London Agency*). (3) We submit that the mode of procedure is regulated by art. 296 entirely, that the right of the controller arises under the Treaty of Peace, and that there is a permanent statutory prohibition which prevents this action from lying.

Gover K.C. and *H. B. Vaisey* for the respondent. This action is not a proceeding to recover an enemy debt at all, but is an administration action by the controller under statutory powers to get in assets. The parties to it are not creditor and debtor. The alien enemies could only assert that in taking accounts between themselves and the late defendant he should be charged with certain moneys in his hands. Art. 297 of the Peace Treaty qualifies art. 296 and authorizes and confirms past acts down to the Peace Treaty and validates future acts thereafter (art. 297, para. (*d*), and ss. 1 and 3 of the annex thereto). The action was properly brought and the motion should be dismissed with costs.

[They referred to *In re Hagelberg Aktiengesellschaft* (4); *Stevenson & Sons* v. *Aktiengesellschaft für Carton-Nagen-Industrie* (5); *In re Anglo-Austrian Bank* (6); and *Rodriguez* v. *Speyer Brothers*. (7)

Clayton K.C. in reply.

EVE J. [after stating the facts as above set out continued :] In support of the motion to stay the defendant relies on art. 296 of the Peace Treaty and the annex thereto. He contends first that the action is a proceeding for the recovery of an enemy debt in that it is a debt payable before the war by a national of one of the contracting Powers

(1) [1921] 1 Ch. 269, 274.
(2) [1921] 1 Ch. 284.
(3) Ante, p. 30.
(4) [1916] 2 Ch. 503.
(5) [1918] A. C. 239.
(6) [1920] 1 Ch. 69.
(7) [1919] A. C. 59.

residing within its territory to a national of an opposing Power residing within its territory (see art. 296, s. 1) or alternatively, which became payable during the war to nationals of one contracting Power residing within its territory and arose out of transactions or contracts with nationals of an opposing Power resident within its territory of which the total or partial execution was suspended on account of the declaration of war (s. 2 of the same article). Then he says that by art. 296 it is provided that debts coming within either of the above categories are to be settled through the intervention of clearing offices to be established by each of the high contracting parties and that each of the high contracting parties is bound to prohibit, as from the coming into force of the Treaty, both the payment and the acceptance of payment of such debts, and also all communications between the interested parties with regard to the settlement of the said debts otherwise than through the clearing offices (s. 4, para. (*a*), of art. 296).

In the annex to art. 296 dealing with the principles and procedure according to which the settlements provided for in the article are to be effected, s. 3 emphasises the importance of para. (*a*) of s. 4 of the article, and provides as follows: "The High Contracting Parties will subject contraventions of para. (*a*) of Article 296 to the same penalties as are at present provided by their legislation for trading with the enemy. They will similarly prohibit within their territory all legal process relating to payment of enemy debts, except in accordance with the provisions of this Annex." Then finally it is pointed out that by ss. 16 and 23 of the annex a special tribunal is set up for the determination of disputes between the two clearing offices, and for recourse to legal proceedings in the case only of claims held by that tribunal, or by the clearing offices, not to fall within art. 296. I agree, assuming this action to be one for the recovery of an enemy debt, its commencement in May, 1920, four months after the coming into force of the Peace Treaty and its continued prosecution, would seem to be in contravention of art. 296 and the annex thereto. But art. 296 is followed by

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art. 297 and an annex wherein are to be found important provisions undoubtedly controlling and to some extent qualifying those to be found in art. 296, and its annex. In approaching the construction of art. 297 it must be borne in mind that the Act, and the series of Acts under which the orders of the Board of Trade were made, including the order of November, 1918, are still in force, and are included in the expression "exceptional war measures" used in art. 297 and its annex (see s. 3 of the annex). By para. (*a*) of the article the exceptional war measures taken by Germany with respect to the property, rights, and interests of nationals of Allied or Associated Powers including companies and associations in which they are interested when liquidation has not been completed, are to be immediately discontinued or stayed. Not so the exceptional war measures taken by the Allied and Associated Powers, for by para. (*b*) of the same article they reserve the right to retain and liquidate all property, rights, and interests belonging, at the date of the coming into force of the Treaty, to German nationals or companies controlled by them within their territories; and stipulate that the liquidation shall be carried out in accordance with the laws of the Allied or Associated State concerned and that German owners are not to dispose of such property, rights, or interests, nor to subject them to any charge without the consent of that State. Finally by s. 9 of the annex it is stipulated that until completion of the liquidations provided for by para. (*b*) the property, rights, and interests of German nationals shall continue to be subject to exceptional war measures "that have been or will be taken with regard to them." Now, I have to ask myself: Can these provisions properly be construed as limited to a confirmation of what has already been done under exceptional war measures prior to the coming into force of the Treaty? I do not think they can; there is nothing in the nature of a stay imposed; on the contrary, the continued application of exceptional war measures to the property, rights, and interests of German nationals is expressly stipulated for, and liquidation is to proceed not according to

art. 296 of the Treaty, but according to the law of the Allied or Associated State concerned. The conclusion at which I have arrived that art. 297 and the annex are intended not only to confirm all acts done down to the date of the coming into force of the Treaty by the Allied or Associated Powers, but to validate all acts to be done thereafter in the execution of the exceptional war measures, is confirmed by para. (*d*) of the article, and ss. 1 and 3 of the annex. I need not read those paragraphs in extenso ; enough, perhaps, if I point out that by para. (*d*) all the exceptional war measures, or measures of transfer, or acts done or to be done in execution of such measures are, as between the Allied and Associated Powers, or their nationals on the one hand, and Germany or her nationals on the other hand, to be considered as final and binding upon all persons, and that by s. 3 of the annex acts in the execution of the exceptional war measures include, amongst other things, orders and decrees of Courts applying these measures to enemy property. I think it is impossible to read the two arts. 296 and 297 together without seeing that the provisions of art. 296 are qualified by those of 297, and without coming to the conclusion that, according to its true construction, the application of art. 297 cannot be confined to acts and procedure prior to the coming into force of the Treaty of Peace, but extends also to subsequent acts and procedure.

That being so, I am of opinion on the materials before me that this action was properly brought, and I am unable to make the order asked for by the notice of motion. It has been argued that this action is not an action in the nature of a proceeding to recover an enemy debt, but is really in the nature of an administration action in which the parties do not occupy in any sense the relationship of creditor and debtor ; that the alien enemies here could not have recovered for themselves the amount of their claims : all they could have done was to assert a right that, in taking the accounts as between themselves and the late defendant, he should be charged with certain moneys in his hands, and their interest in the moneys so brought into account would not be of a

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direct character entitling them to claim payment to themselves of any part of the money, and would in fact only be ascertained when the whole of the affairs of the partnership had been finally wound up. I think there is a great deal to be said for that contention, but inasmuch as it is, in the view I have formed of the construction of the Treaty, unnecessary to decide this question it can well be left open for decision when it arises in another case.

One other objection was taken: Had I upheld it it might have necessitated an amendment of the record, but would not have involved a stay of the action. It was argued that there is no power to sue in the name of a foreign firm in this country. It may be that had the record remained in the condition in which it was when the action was commenced an amendment would have been necessary, but, as I have already pointed out, within three months of the commencement of the action the controller was, by amendment, added as co-plaintiff; and this in my view disposes of any substance there might have been in the objection had no such addition been made. Looking at the Act, it appears to me that the controller might have sued, and possibly ought to have sued, as controller of the business of Arnold Otto Meyer & Co., exactly in the same way as a trustee in bankruptcy can sue as the trustee of A. B. a bankrupt. But the amendment which was made obviates the necessity for any further amendment; and the result is that I dismiss the motion, and inasmuch as it is an attempt to stay the action, the right course is to dismiss it with costs.

Solicitors: *Roney & Co.; Walker, Martineau & Co.*

NOTE.—An appeal was brought from this decision and heard by the Court of Appeal on May 30, 1921, when Lord Sterndale M.R. and Atkin L.J. dismissed the appeal, the costs there and below to be costs in the cause.

G. M.

EVE J.
1921
June 10, 14.

In re PECK'S SETTLEMENT.

PECK *v.* HAMILTON.

[1921. P. 303.]

Revenue — Income Tax — Deduction — Settlement — Construction — Trust for payment out of "net rents"—Annuity "clear of income tax"—Covenant—Void Agreement — Income Tax Act, 1842 (5 *&* 6 *Vict. c.* 35), *s.* 103—*Income Tax Act*, 1918 (8 *&* 9 *Geo.* 5, c. 40), *All Schedules Rules, r.* 23, *sub-r.* 2.

By a deed of settlement made in pursuance of an order of the Divorce Division freehold property and stocks sufficient to produce an annuity of 175*l.* clear of income tax were settled by P. upon his wife, the plaintiff, and the trustees of the settlement were directed to pay this annuity to the plaintiff, clear of income tax, out of the net rents and profits of the settled property. By a supplemental deed P. further covenanted for himself and his executors, etc., to make good any deficiency in the annuity. The income from the settled property became insufficient to provide the annuity and the deficiency was made good by P., but on his death his executrix declined to make it good. Upon a summons by the plaintiff for a declaration of her rights under the settlement:—

Held, that the settlement to pay the annuity clear of income tax as well as the covenant by P. to make up any deficiency, so far as it related to the tax, fell within the mischief of the Income Tax Act, 1842, s. 103, and the Income Tax Act, 1919, and were void and unenforceable.

Blount v. *Blount* [1916] 1 K. B. 230 followed.

Brooke v. *Price* [1917] A. C. 115 distinguished.

ADJOURNED SUMMONS.

By an order of the Divorce Division dated July 13, 1908, it was directed that William Roland Peck should settle property sufficient to produce an income of 225*l.* clear of income tax upon his wife, the plaintiff, Estella Theresa Vernon Peck. By a deed of settlement dated November 18, 1908, made in pursuance of this order, between W. R. Peck, his wife, and two trustees, and under an agreement come to between the husband and wife, certain freehold property and stocks sufficient to produce a reduced annuity of 175*l.* clear of income tax were settled by W. R. Peck upon the plaintiff; and the trustees of the settlement were directed out of the net rents and profits of the settled property and out of income arising from sale moneys, to pay the annual

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sum of 175*l.* clear of income tax to the plaintiff during the joint lives of herself and her husband, and to pay the balance, if any, of such rents and income to him. By a supplemental deed of October 20, 1910, further property was settled by W. R. Peck sufficient to provide annual sums of 75*l.* and 25*l.* free of tax for two daughters of the marriage, and certain variations were made in the settlement of 1908, amongst others one that the annuity of 175*l.* should be paid to the wife during her life, and by clause 5 of this deed W. R. Peck, for himself, his executors and administrators, covenanted with the trustees that in case in any year the said rents, profits and income should not be sufficient to provide the sums of 175*l.*, 75*l.*, and 25*l.* he, his executors, or administrators, would pay to the trustees the amount of such deficiency to be held by them upon the like trusts, and in the meantime and until payment such deficiency should be charged upon the corpus.

The elder of the two daughters died on May 22, 1914, and part of the settled freehold property was released by the trustees. The trustees of the settlement from time to time paid over to the plaintiff the net income from the settled property, and W. R. Peck down to the time of his death on January 30, 1920, paid over to the trustees the amount required to make up the deficiency in the annuities of 175*l.* to the plaintiff and of 25*l.* to his surviving daughter, as the income from the settled property was insufficient. By his will dated January 1, 1917, W. R. Peck appointed the defendant, Ada Peck, his executrix, and she proved his will. The trustees of the settlement required Ada Peck, as executrix of the testator, to make up the deficiency in the annuities, but she declined to do so, alleging that the whole contract was void. The plaintiff took out an originating summons for the determination of her rights under the settlement, and asking whether or no she was entitled to her annuity free of income tax.

Courthope Wilson K.C. and *Maurice Barnett* for the plaintiff. This annuity of 175*l.* being payable to the plaintiff

"clear of income tax" out of the "net rents" and profits of the hereditaments comprised in the settlement is payable out of a tax-free fund. The income tax has already been paid by the trustees or deducted at its source. It comes within the principle of *Brooke* v. *Price* (1) which governs this case. It is within the fourth class there mentioned by Lord Findlay. *Blount* v. *Blount* (2) is distinguishable. Where you have a deed providing directly for the payment of an annuity free of tax, that is void under s. 103 of the Income Tax Act, 1842. But here the tax is to be provided for first, as it is to be a fund sufficient to produce the 175*l.*, which is to be paid to the annuitant. The words are "out of the net rents and profits." It is equivalent to an additional sum for income tax, and then the ultimate balance is to go to Mr. Peck. This payment, therefore, does not come within the prohibition of the Act. Under the covenant in the supplemental deed of October 20, 1910, there is a personal liability on Mr. Peck to make up any deficiency in the annuity, and that deficiency is further charged upon the corpus. There is nothing illegal in that.

Gover K.C. and *W. H. Gover* for the defendant, Ada Peck, executrix of the settlor. This is a void contract under the new Income Tax Act (8 & 9 Geo. 5, c. 40), which re-enacts in slightly different form (by r. 23, sub-r. 2, of the All Schedules Rules to that Act) the provisions of s. 103 of the Act of 1842. It is an agreement for an annual payment in full without deduction of income tax, and comes within the clear decision of *Blount* v. *Blount*. (2) The agreement might have been so worded as to be a good contract, but it was not. "Net rents and profits" mean the rents after payment of all necessary outgoings, not "after payment of income tax." That is the distinction between the present case and *Brooke* v. *Price*. (3) It comes within the second class of the law stated by Lord Findlay in that case. Later cases on the point are *In re Shaw* (4) and *In re Cain's Settlement*. (5) The

(1) [1916] 2 Ch. 345; [1917] A. C. 115.
(2) [1916] 1 K. B. 230.
(3) [1917] A. C. 121.
(4) [1918] P. 47.
(5) [1919] 2 Ch. 364, 367.

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latter was a case of a voluntary settlement, and Warrington L.J. referred to *Brooke* v. *Price* (1) as the case of a tax free fund. The text-books treat the question as settled by authority for many years: Konstam's Law of Income Tax, pp. 59, 185, 199; Pratt and Redman's Income Tax, 9th ed., p. 77; *Floyer* v. *Bankes* (2); *Attorney-General* v. *Shield.* (3)

On the second question as to the validity of the separate covenant by Mr. Peck to make up the deficiency that is also bad and comes within the same principle.

Courthope Wilson K.C. in reply. *In re Shaw* (4) is in my favour. "Net rental" must mean after deduction of all taxes. The reason of the Act is to be found in the statement by Lord Davey in *London County Council* v. *Attorney-General.* (5)

J. M. Stone for the trustees of the settlement.

EVE J. The question which arises on this summons is whether the applicant is entitled to have an annuity paid to her free of income tax under a settlement contained in a deed of November 18, 1908, as varied by certain supplemental deeds, the deed of 1908 having been executed pursuant to an order of the Divorce Court directing her husband to settle property actually producing an income of 225*l.* per annum clear of income tax. [His Lordship stated the terms of the Order of July 13, 1908, the settlement of November 18, 1908, and the effect of the supplemental deeds, and continued:] Is the arrangement or agreement come to by the parties to the deeds of 1908 and 1910, under which a trust is created for the payment to the applicant, out of the net rents and profits of the settled property, of the annual sum of 175*l.* clear of income tax, void under the Income Tax Acts, or is it enforceable?

The question has become a matter of importance, because, owing to the increased tax now payable, the income of the property remaining subject to the trusts is insufficient to

(1) [1916] 2 Ch. 345.
(2) (1863) 32 L. J. (Ch.) 610.
(3) (1858) 3 H. & N. 834.
(4) [1918] P. 47.
(5) [1901] A. C. 26, 42.

pay the existing annuities in full, and the applicant is desirous of enforcing against the estate of her former husband the covenant on his part to make up any deficiency. The relevant section at the date of the settlement was s. 103 of the Income Tax Act, 1842, by which it was enacted that all contracts, covenants, and agreements for payment of any interest, rent, or other annual payments in full without allowing deduction of the tax should be utterly void. This has now been replaced by r. 23, sub-r. 2, of the All Schedules Rules to the Act of 1918, which provides that "every agreement for payment of interest, rent, or other annual payment in full without allowing any such deduction shall be void," the reference being to the deduction of tax authorized by the Act. On behalf of the last defendant who represents the husband's estate it is not disputed that the arrangement is one which might have been carried out in a legal manner, but it is contended that the method adopted is an infringement of the statute.

It is said that there would have been nothing illegal in an arrangement whereby the whole of the property charged with the payment of the annuity was further charged with the payment of an additional sum equal to the tax, or whereby the property had been settled upon trust to pay the tax on the whole income of the settled fund, and then to pay to the applicant the full sum of 175*l*. But, be this as it may, neither of these expedients was adopted, and what I have to decide is whether this settlement falls within the mischief of the Act, and, so far as it purports to secure to the applicant a tax free annuity, ought to be treated as void. In my opinion, upon the construction of these documents, an agreement has been entered into between husband and wife and the trustees for payment, out of the income of the property brought into settlement, of the annuity in full without any deduction for income tax. The case falls directly within the line of authorities culminating in *Blount* v. *Blount* (1) and is distinguishable in its facts from *Brooke* v. *Price* (2), relied on by counsel for the applicant. It was contended

(1) [1916] 1 K. B. 203. (2) [1917] A. C. 115.

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that the trust to apply the net rents and profits in payment of the annual sum of 175*l.* to the applicant was, in substance, a trust operating only on the net income after payment of the tax, but this argument ignores the fact that, although the income which actually reaches the hands of the trustees may be only that which remains after payment of the tax by reason of the tax having been deducted at the source, the income subject to the trusts of the settlement is the gross income, and the persons who deduct the tax at the source account for it to the Revenue as the agents of those beneficially interested. In my opinion it is impossible to construe this instrument as a settlement of a tax free fund. It is an ordinary settlement of property, the income of which is liable to the tax, and it cannot be turned into a tax free fund merely because the tax is accounted for by the beneficiaries through agents who deduct it at the source. I think this is clearly a contract or agreement to pay the annual sum to the applicant free of income tax, and is void. The covenant on the part of the husband to make good any deficiency is of the same nature and, so far as it relates to the tax, cannot be enforced. I direct costs as between party and party to be paid out of the trust funds.

Solicitors: *George Fieldhouse; Hart, Reade & Co.*

G. M.

EVE J.
1921
June 30.

In re GREG.

FORDHAM *v.* GREG.

[1920. G. 2921.]

Will—Devise of Realty subject to Mortgages secured thereon—Equitable Mortgagee—Death of Mortgagee before Testator—Testator appointed one of Mortgagee's Executors and residuary Legatees—Estimated Share of residuary Estate in Excess of Mortgage Debt—Subsistence of Mortgage at Testator's Death.

By his will dated August 5, 1919, a testator devised his lands in Herts unto and to the use of trustees upon trust for sale as therein mentioned and to hold the proceeds of sale "upon trust to pay the costs of such sale and to discharge and repay all mortgage debts secured on the said estate," and then subject to certain other payments upon trust to pay the net proceeds of sale to his brother. By a codicil dated September 7, 1920, the testator, after making certain devises and bequests not material to be stated, confirmed his will. Part of the property in Herts had been charged by the testator's predecessor in favour of Margaret Greg to secure a loan of 2500*l.* by a deposit of title deeds coupled with a memorandum undertaking to execute a legal mortgage when required to do so. The testator had himself also charged another part of the estate to Margaret Greg to secure a loan of 5000*l.* by a deposit of title deeds and an agreement by which he agreed to repay the principal money and interest and also agreed to execute a legal mortgage when required to do so. By her will dated November 11, 1919, Margaret Greg, who died without either of the equitable mortgages having been paid off, appointed the testator and another her executors and residuary legatees. The will was duly proved by both executors on August 27, 1920, and the testator died on September 18, 1920. There was evidence that the testator's share in the residue of Margaret Greg's estate would exceed the two principal sums, but that the estate had not been fully administered at the death of the testator. The title deeds deposited to secure the loan of 2500*l.* were after the testator's death found amongst his papers. The other title deeds were in the hands of Margaret Greg's solicitors. No interest had been paid on the mortgages since Margaret Greg's death, but it had been regularly paid by the testator up to then:—

Held, that the result of the testator being the mortgagee's executor was that he had to be treated as having in his hands on the mortgagee's death the amount owing on the mortgages as part of her estate, but that on the evidence he must be treated as having intended to discharge them out of his share of the mortgagee's estate. The charges were therefore no longer subsisting at the date of his death.

ADJOURNED SUMMONS.

By his will dated August 5, 1919, Thomas Tylston Greg, after appointing executors and trustees and making certain

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devises and specific and pecuniary bequests, gave, devised and bequeathed (clause 11) unto and to the use of his trustees "all other my lands houses messuages buildings hereditaments and premises in the County of Hertford" upon trust for sale as therein mentioned, and to hold the proceeds of sale "upon trust to pay the costs of such sale and to discharge and repay all mortgage debts secured on the said estate," and to pay all legacies and to repay unto his residuary legatee the sums paid by her for the discharge of funeral and testamentary expenses and debts, and to pay estate duty on his real and personal estate, and then upon trust "to pay the net proceeds of such sale after such deductions as aforesaid to my brother Edward Hyde absolutely." After another devise of real estate the testator gave his ultimate residue to his wife absolutely.

By a codicil dated September 7, 1920, the testator made a devise not affecting the devise in clause 11 of his will and bequeathed certain additional legacies, and in all other respects confirmed his will.

The property comprised in the devise in clause 11 of the will was known as the Coles Park Estate. Part of this estate called Gaylor's Farm had been charged by Robert Philips Greg, a predecessor in title of the testator, in favour of Margaret Greg to secure a loan of 2500*l.* This charge was an equitable mortgage effected by a deposit of title deeds coupled with a memorandum undertaking to execute a legal mortgage when required to do so. On June 12, 1919, the testator also charged Coles Hill House, another part of the Coles Park Estate, to secure a loan of 5000*l.* from Margaret Greg. This also was an equitable mortgage effected by a deposit of title deeds and an agreement dated June 12, 1919, by which the testator agreed to repay the principal money and in the meanwhile to pay interest thereon, and also agreed to create a legal mortgage on Coles Hill House (therein described as Rectory House situate at Westmill) when required to do so.

By her will dated November 11, 1919, and a codicil dated February 5, 1920, Margaret Greg, who died on May 6, 1920,

without either of the mortgages having been paid off, appointed the testator and Ernest William Greg her executors and also residuary legatees in equal shares. The will and codicil were duly proved by both executors on August 27, 1920. The testator died on September 18, 1920.

This summons was taken out by the testator's executors to have (inter alia) the question determined whether the principal sums of 2500*l.* and 5000*l.* were subsisting charges, in the events which had happened, at the date of the testator's death.

There was evidence that the testator's share in the residue of Margaret Greg's estate would when the estate was fully administered amount to a sum considerably in excess of the two principal sums. The title deeds deposited to secure the loan of 2500*l.* were after the testator's death found in his strong room amongst his papers. The mortgage to secure 5000*l.* and interest had been effected by the testator in order to free other property of his, and it was in pursuance of a suggestion made by him at the time that the title deeds of Coles Hill House were deposited with Margaret Greg's solicitors as being more in order. They were still in their custody at the date of the testator's death. No interest had been paid by the testator on either mortgage since the death of Margaret Greg, although up to then the interest had been regularly paid.

Underhill for the summons.

Gover K.C. and *Draper* for the testator's residuary legatee. As there has been no express release of the principal sums, the presumption is that the mortgages were subsisting at the testator's death, so that the Hertfordshire estate stands charged with their payment to Margaret Greg's estate. The position as to the two mortgages differs, for the 5000*l.* was a debt of the testator while the 2500*l.* was not, but was merely an incumbrance on his property. It will be suggested that the mortgages are gone because the testator was the mortgagee's executor and his residuary legatee for a larger amount. But the testator by a codicil made after the mortgagee's

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death confirmed his will, including the direction to repay out of the proceeds of sale of the Hertfordshire estate all mortgage debts secured on the estate. He has therefore treated the mortgages as still subsisting.

If that is not sufficient, it becomes necessary to consider the effect of the testator's appointment as executor and of his being a residuary legatee. The effect of the appointment of a debtor as executor at common law was that the debt was irrecoverable because the executor could not sue himself. In equity, however, this was met by treating the executor as having in his hands as assets of the testator and in a fiduciary capacity the amount of the debt: *In re Bourne.* (1) He might be compelled to bring the amount into Court, and it is submitted that he would have to do this although he was a residuary legatee for a larger amount.

[EVE J. In dividing the residuary estate, would he not be treated as having received the amount of the debt already ?]

The only way in which it can be suggested that the debt would be extinguished is by virtue of a set-off, but the existence of a set-off does not extinguish a debt. There is, in fact, no set-off. The view that there was has been repudiated in the later authorities: *In re Melton.* (2) There could be no extinguishment ipso facto because the creditors and legatees other than residuary legatees would have a prior claim. At most the executor can, if there are sufficient assets without collecting the debt, abstain from getting it in; but there is no right in the legatee to refuse to pay his debt because he is a legatee. In any case the legacy could not affect the mortgage of 2500*l.*, because that was not a debt of the testator. There was a right in rem in respect of it, and nothing else.

[EVE J. referred to Williams on Executors, 10th ed., vol. i., pp. 1056, 1057, and *In re Barker.* (3)]

Droop for the other executor and residuary legatee of the mortgagee.

Maugham K.C. and *Harman* for Edward Hyde. It can

(1) [1906] 1 Ch. 697. (2) [1918] 1 Ch. 37.
(3) [1918] 1 Ch. 128, 132.

make no difference that the codicil was made after the mortgagee's death, as the will confirmed did not refer specifically to these mortgages, but merely provided for the payment of any subsisting mortgages on the Hertfordshire estate out of the proceeds of sale of that property. The question is what was the position at the death of the testator, and the relevant consideration is whether it was to his interest to have the mortgages discharged or kept alive. There is no equity on either side as between the devisee of the Hertfordshire estate and the testator's residuary legatees.

First it is necessary to consider the testator's position after the mortgagee's death. Take the mortgage for 5000*l.* If the testator had not been the mortgagee's executor and proceedings had been brought by the executors to recover payment of the mortgage debt and interest and to obtain an order upon the testator to execute a legal mortgage, foreclosure and sale, the testator would have had a complete answer. He would say that he was entitled to a share of residue from the mortgagee's estate largely exceeding the mortgage debt and interest and that he was treating the mortgage debt and interest as payments on account of the sum due to him. Of course the position would be different if the executors needed the debt to pay creditors of the estate, but it is admitted here that the testator's ultimate share of the estate is larger than both the principal sums. The position is the same as to the 2500*l.* mortgage except that the executor's only remedy would be to ask for specific performance, foreclosure and sale. Obviously no Court would order foreclosure and direct expensive accounts in circumstances such as these. But in addition the testator is an executor of the mortgagee, so that the rights between the testator and the mortgagee's estates are purely equitable.

It remains to consider what it was to the interest of the testator to do. Clearly his interest was to discharge his estate and, if so, the Court will assume that he did so in the absence of evidence to the contrary: *In re French-Brewster's Settlements* (1); and there was no need for any documents

(1) [1904] 1 Ch. 713.

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to do this, as the mortgages were equitable. This is not a case of true merger or of a release of the mortgages, but circumstances have arisen which make it equitable to treat these equitable interests as discharged.

Gover K.C. in reply on the cases. *In re French-Brewster's Settlements* (1) has no application here. There is nothing to raise a presumption that the testator intended to discharge the mortgages as in that case.

EVE J. This question presents some difficulty, but, in my opinion, it is to be solved by an examination of the relative positions of the testator and the estate of his aunt, Margaret Greg, at the date of her death. At that time the testator was the owner of two farms which were each subject to an equitable charge in favour of the aunt. There can be no doubt that both these equitable charges were subsisting at the date of her death, and I am informed that they were included in the affidavit for probate as part of her personal estate. By her will she appointed the testator to be one of her executors and left him a half-share of her residuary estate. The position as regards the charges was that the testator was in respect of one of them a debtor to his aunt's estate for the principal sum of 5000*l.* with any accrued interest, and that in respect of the other, property of which he was owner stood charged in her favour for the principal sum of 2500*l.* and interest. The result was that one of the executors of Margaret Greg's estate was also a debtor to the estate and at law could sue neither for recovery of the debt of 5000*l.* nor to enforce the security in respect of the sum of 2500*l.* In equity, however, the testator would be treated on the death of his aunt as having in his hands, as part of her estate, the moneys owing on the charges with the interest that had accrued down to that date; and prima facie the result was to get rid of the debt and charges and to convert the testator into the holder of this money as part of the assets of the aunt.

Mr. Gover would have me stop there and hold that the

(1) [1904] 1 Ch. 713.

position thenceforth remained crystallized, so that the testator continued down to the date of his death to hold the sums originally secured by the two charges as assets of his aunt's estate; and he argues from this that after the testator's death these sums and any additional payments made in respect of his moiety of the aunt's residue would form part of his own residuary estate and pass under the residuary bequest in his will. If that be correct, it concludes the whole matter; but I do not feel able to adopt that view.

I must, I think, have regard to the facts that the testator was owner of the farms charged and that his interest in the testatrix's estate was largely in excess of the moneys secured by these charges. And in my opinion the material question is whether between the date of the death of the testator's aunt and his own death he did anything which enables me to decide what he intended to do; did he intend to apply these assets of the aunt's estate already in his hands and ultimately coming to him as her residuary legatee in discharging these mortgage debts, or did he intend to keep the charges alive and to treat himself as retaining the moneys owing thereon as assets of the testatrix in his hands, as her executor?

For one thing it is said that there is no evidence that he applied or intended to apply these moneys in discharging the mortgages; for another that, inasmuch as he made a codicil so late as September 7, 1920, confirming his will, including the direction as to any mortgages on the Hertfordshire estate, he was obviously then treating these charges as still subsisting. I do not think that his codicil was a sufficient manifestation of an intention to keep these particular charges alive. There is no reference to them specifically, and there is no evidence to lead me to form any opinion as to whether on September 7, 1920, the testator was contemplating his own early death. I think all he meant by the direction in the will as confirmed by the codicil was that if there were any charges on the Hertfordshire estate subsisting at the date of his death, they were to be discharged out of the proceeds of sale of that estate; and, in my opinion, he was not by that general reference to charges manifesting any

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intention of keeping these particular charges alive or by the confirmation of his will giving any indication that he regarded them as being still alive.

The evidence shows that the transactions between the testator and his aunt were treated as matters of business; the securities were handed over to the proper person and the interest regularly paid. There are two matters which I think are material on this question of intention. First, the testator paid no interest on the charges after his aunt's death. After her death interest fell due on the 2500*l.* on July 25, 1920, and on the 5000*l.* on August 2, 1920, but no interest was paid. Secondly, the testator became possessed by some means or other of the documents for securing the 2500*l.* They were found among his papers in the strong room which he used for the safe custody of his own documents. These matters raise the presumption that the testator, who seems to have been scrupulous in his dealings with his aunt, treated the charges as satisfied and no longer bearing interest, and regarded these documents as belonging to him and as no longer belonging to the aunt. They are sufficient, I think, to indicate an intention to discharge the mortgages out of his share of the assets of the testatrix already in his hands. Mr. Gover suggested that the testator really had no interest in either discharging or keeping alive these mortgages, as he was himself entitled both to the interest on the capital moneys outstanding and to the capital moneys themselves when paid off, so that it was of small importance to him whether the charges were kept alive or not; but I do not think that is the attitude which an ordinary landowner would adopt. So soon as he had in hand moneys applicable to the discharge of the incumbrances he would, I think, be desirous of applying them at once to that purpose. I hold that it was more to the testator's interest to apply these assets in satisfying these charges than to keep the charges alive.

On the whole, therefore, I come to the conclusion that I must treat these charges as having been satisfied, and decide that there is no obligation on the part of the specific devisee

to make good to the residuary estate the amount which was owing to the aunt at the date of her death. I will declare that the principal sums of 5000*l.* and 2500*l.* did not constitute subsisting charges on the Hertfordshire estate at the death of the testator.

Solicitors: *Lane, Fagge & Co.; Hedley Norris & Co., for Cunliffe, Greg & Co., Manchester; Sharpe, Pritchard & Co., for Alsop, Stevens, Crooks & Co., Liverpool.*

H. C. G.

In re LEVINSTEIN.

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[1921. L. 3297.]

Will—Construction—War Legislation—Bequests of Annuities to Alien Enemies —"Until the happening of any event whereupon the same if given absolutely . . . . would no longer be received" by the annuitants—Treaty of Peace with Germany—Treaty of Peace with Austria—Charge—Forfeiture—Trading with the Enemy Amendment Act, 1914 (5 *Geo.* 5, *c.* 12), *ss.* 3, 4.

By his will a testator, who died on January 14, 1916, directed his executors to pay annuities to an Austrian and two German nationals "until he or she shall die or mortgage or otherwise charge the same . . . . or until the happening of any event whereupon the same if given to him or her absolutely would no longer be received by him or her for his or her benefit." No part of the annuities could be paid to the annuitants during the war by reason of this Trading with the Enemy Amendment Act, 1914, but the accumulations were retained by the executors, as no order was made under s. 4 of the Act vesting the annuitants' interests in the custodian:—

Held (1.) that as the Act of 1914 only suspended payments to the alien enemies and did not determine the ownership and ultimate destination of their annuities, those annuities were not forfeited ab initio;

(2.) That the annuities were forfeited and determined in the case of the German nationals as from January 10, 1920, by virtue of the charge imposed by the Treaty of Peace with Germany and the Treaty of Peace Order, 1919, and in the case of the Austrian national as from July 16, 1920, by virtue of the charge imposed by the Treaty of Peace with Austria and the Treaty of Peace (Austria) Order, 1920; and

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(3.) That the accumulations of the annuities until those respective dates became subject to the charges and payable therefore to the custodian or the administrator of Austrian property, as the case might be.

ADJOURNED SUMMONS.

By his will dated January 14, 1916, Ivan Levinstein, after making certain specific and pecuniary bequests, directed his executors to pay the following annuities—namely, to his sister-in-law Ida Pollak the annuity or annual sum of 150*l.* for her life, to his sister Jenny Avellis the annuity or annual sum of 100*l.* for her life, and to his sister Anna Jacobi the annuity or annual sum of 75*l.* for her life; and after giving another annuity and giving directions as to their payment quarterly and the payment of duties thereon and the appropriation of funds to answer them the testator continued: "I direct that the said annuities . . . . shall only be paid to the several parties entitled thereto respectively until he or she shall die or mortgage or otherwise charge the same or any part thereof or attempt so to do or attempt otherwise to dispose thereof in the way of anticipation or do or suffer any act or thing or until the happening of any event whereupon the same if given to him or her absolutely would no longer be received by him or her for his or her own benefit." There was a subsequent gift of the testator's residuary real and personal estate. On March 10, 1916, the testator made a codicil containing no material alteration of his will and died on March 15, 1916.

Ida Pollak was a widow and an Austrian national residing at Vienna, and Jenny Avellis and Anna Jacobi were both widows and German nationals residing in Germany.

By reason of the Trading with the Enemy Amendment Act, 1914, no part of the annuities was ever paid to the annuitants, but the amounts were retained by the executors, as no vesting order was ever made under s. 4 of the Act vesting these accumulations in the custodian. The surviving executor now took out this summons at the Manchester District Registry asking (1.) whether upon the true construction of the will and in the events which had happened and in

particular having regard to the provisions of the Treaty of Versailles and the Treaty of Peace Order, 1919, the annuities to the German nationals became forfeited, and if so on what date; (2.) whether upon the true construction of the will and in the events which had happened and in particular having regard to the provisions of the Treaty of St. Germain-en-Laye and the Treaty of Peace (Austria) Order, 1920, the annuity to Ida Pollak became forfeited, and if so on what date; and (3.) whether any and what parts of these annuities ought to be paid (*a*) to the respective annuitants, or (*b*) to the custodian so far as regards the annuities to German nationals and to the administrator of Austrian property so far as regards Ida Pollak's annuity.

Under the Treaty of Versailles, art. 297, to which statutory effect is given by the Treaty of Peace Order, 1919, as from the date of the ratification of the Treaty on January 10, 1920, the property of a German national in this country on that date became subject to a charge, as the result of which he was deprived of the property. The Treaty of St. Germain-en-Laye, art. 249, to which statutory effect was given by the Treaty of Peace (Austria) Order, 1920, as from the date of the ratification of the Treaty with Austria on July 16, 1920, operated in the same way in reference to the property of an Austrian national in this country as on that date.

Abbott for the summons.

Courthope Wilson K.C. and *H. S. Barker* for a residuary legatee. There was a forfeiture of the annuities at latest on January 10, 1920, as regards the German nationals, and July 16, 1920, as regards the Austrian national: *In re Schiff.* (1) Really however forfeiture took place here ab initio. At the date of the testator's death the Trading with the Enemy Amendment Act, 1914, was in operation. Under s. 3 a trustee holding property on behalf of an alien enemy was obliged to notify it to the custodian. The custodian might then have obtained a vesting order under s. 4, but this was never done, and accordingly the executors or the survivor

(1) [1921] 1 Ch. 149, 154.

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of them have continued to retain in their hands the arrears of the annuities. No part of them was ever paid to these annuitants, because an event had happened to prevent their receiving the annuities. There was therefore a forfeiture ab initio : compare *In re Sampson.* (1)

C. L. Fawell for a person interested in the income of residue. There was forfeiture ab initio.

[*G. T. Simonds.* It is admitted that payment to the annuitants was at all times illegal without a licence.]

It is true that if the enemy property in this country had not been charged under the Peace Treaties the trustees might after the conclusion of peace have had to account for the arrears of the annuities. In fact however the annuities right from the start never were and never can be paid to the annuitants. No doubt the enemy property was held in suspense until the Peace Treaties, but they have related back and deprived the annuitants of their annuities from the testator's death.

G. T. Simonds for the custodian. The custodian desires a decision whether forfeiture of the annuities to German nationals took place on January 10, 1920. It is submitted that the accumulations of the annuities up to that date passed to the custodian under the Treaty of Peace charge.

W. R. Sheldon for the administrator of Austrian property adopted the same view, except that in the case of the Austrian national the forfeiture would not be until July 16, 1920.

EVE J. The first question is whether an event has happened by reason of which the annuities given by the testator's will have been determined. The clause of defeasance includes as one of the events determining the annuities "the happening of any event whereupon the same if given to him or her absolutely would no longer be received by him or her for his or her own benefit." The annuitants were German and Austrian nationals, and on January 10, 1920, and July 16, 1920, when statutory effect was given to the peace treaties with their respective countries, there happened, in my opinion,

(1) [1896] 1 Ch. 630.

an event upon which the right of the respective annuitants to receive their annuities was absolutely determined. The material provisions of the Peace Treaty with Germany to which statutory effect was given by the Treaty of Peace Order, 1919, have been read from the judgment of Russell J. in *In re Schiff* (1), and it is obvious that his conclusion is correct when he says that "as a result of those provisions, which are statutory, it appears to me that a German national in respect of property which he owned in this country at the date of the coming into operation of the Treaty of Peace had that property taken from him in every sense of the word." That applies equally to the Treaty of Peace with Austria. I must hold, therefore, that the annuities were forfeited in the case of the German nationals on January 10, 1920, and in the case of the Austrian national on July 16, 1920.

It is argued however that the annuitants were incapacitated from receiving their annuities from the date of the testator's death in March, 1916, and therefore that there was a forfeiture of the same immediately upon his death. It is true that under the Trading with the Enemy Amendment Act, 1914, it was illegal at the date of the testator's death and thereafter continued so to be to make a payment of any sort to an alien enemy without licence. But the ownership and ultimate destination of moneys retained under this Act remained in doubt and undetermined until statutory effect was given to the material provisions in the respective Peace Treaties, and in these circumstances it is not possible to say that anything had happened prior to the Peace Treaties coming into operation as the result of which the annuities if given absolutely "would no longer be received" by the respective annuitants "for their own benefit." By virtue of the Peace Treaties the accumulations of the annuities retained by the executors have been swept up and are now payable to the custodian or administrator, as the case may be, but until statutory effect was given to the Peace Treaties the ownership of these accumulations was a matter of uncertainty.

(1) [1921] 1 Ch. 149, 154, 157.

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It may well be that if the custodian had obtained a vesting order under the Trading with the Enemy Amendment Act, 1914, s. 4, that would have caused an immediate forfeiture. I think that very likely, but it must not be taken that I decide the point, for it may well arise in some subsequent case and ought only to be decided after argument. In the present case no vesting order has been made.

I hold it impossible to antedate the forfeiture to any date antecedent to the dates when the Peace Treaties came into operation. The result is that the accumulations of the annuities up to those respective dates must be paid to the custodian or the administrator, as the case may be, and that nothing is payable in respect of the annuities after these dates to the annuitants or any one else.

Solicitors: *A. & G. W. Fox, Manchester; Few & Co., for Dixon & Coles, Wakefield; Coward & Hawksley, Sons & Chance; Solicitor to Clearing House.*

H. C. G.

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Referred to. ELLIOTT *v.* PIERSON. [1948] Ch. 452

[1921. P. 76.]

Vendor and Purchaser—Condition as to Vendor's Rescission of Contract—Notice to rescind after Purchaser's repudiation of Contract and the Issue of his Summons for a Declaration that good Title not shown—London Conditions of Sale.

On April 30, 1920, the defendant (vendor) agreed with the plaintiff (purchaser) for the sale of a house, the contract providing that the conditions of the London Conditions of Sale should apply. Condition 4 of these conditions provided that if the purchaser should insist on any requisition as to the title which the vendor should be unable or unwilling to comply with, the vendor might, "notwithstanding any negotiation or litigation" in respect thereof, rescind the contract unless the requisition was withdrawn within seven days. The purchaser sent in a requisition that the property was subject to restrictive covenants, not disclosed by the contract, and that he reserved his right to object to the title on this ground. On July 22, 1920, the purchaser issued a vendor and purchaser summons for a declaration that a good title had not been shown and for a return of the deposit paid by him under the contract. On July 29, 1920, the purchaser's solicitors wrote repudiating the contract.

In October the vendor's solicitors wrote that she was not disposed to continue the litigation and giving notice of rescission under condition 4. Nothing further occurred in the litigation, and the vendor paid the purchaser's costs of it. In an action by the purchaser to recover from the vendor the costs and expenses of the investigation of the title :—

Held, that the vendor was entitled to rescind, and that the purchaser's claim failed.

THE plaintiff, Frederick C. Procter, purchased from the defendant, Mrs. Emily A. Pugh, a freehold house called "Endon," No. 15, Canadian Avenue, Catford Bridge, S.E., for 2,075*l*., whereof 207*l*. 10*s*. was paid as a deposit.

The agreement for sale was in writing, and dated April 30, 1920, and the plaintiff thereby agreed "to complete the said purchase in every respect in accordance with the within particulars and conditions so far as the same are applicable to a sale by private treaty," the particulars and conditions being those intended to be applicable at a sale by auction proposed for May 11, 1920. The particulars stated that the property was subject to a rent charge of 15*l*. per annum. The conditions of sale stated as follows: "The property is sold subject to the conditions following and to the conditions known as the London Conditions of Sale, 5th ed., so far as differences of tenure permit and those conditions are not inconsistent with the conditions following, which are to prevail in case of any conflict between them and the London Conditions. So subject, the London Conditions are to be deemed to be incorporated herein and shall be read as forming part of this contract. A copy of the London Conditions may be inspected at the offices of the vendor's solicitors any day during business hours and in the sale room at or immediately before the sale."

The other conditions were immaterial to this report. Clauses 4, 6, and 21 of the London Conditions of Sale (1), which were referred to by Sargant J., are as follows :—

"4. The Purchaser shall send his requisitions and objections (if any) in respect of the title and all matters appearing on the Abstract Particulars or Conditions or connected with the

(1) Published by the Solicitors' Law Stationery Society, Ld., 22, Chancery Lane, W.C. 2.

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sale to the office of the Vendor's solicitor within the time limited by the Special Conditions for this purpose and in default of or subject only to any such requisitions and objections so made the Purchaser shall be taken to have accepted the title. All further requisitions or objections arising out of any reply by the Vendor to any of the Purchaser's requisitions shall be delivered within the time limited in that behalf by the Special Conditions. For the purpose of the stipulations made in this Condition time shall be of the essence of the contract, and the Abstract shall be deemed to be perfect (though otherwise defective) if it supply the information suggesting any requisition or objection. If the Purchaser shall insist on any requisition or objection as to the title, evidence of title, conveyance, possession, receipt of rents, or any other matter appearing on the Abstract, Particulars or Conditions, or connected with the sale, which the Vendor shall be unable or unwilling to remove or comply with, the Vendor shall be at liberty, notwithstanding any negotiation or litigation in respect of such requisition or objection, to give to the Purchaser or his solicitor notice in writing of his intention to rescind the contract for sale unless such requisition or objection shall be withdrawn; and if such notice shall be given and the requisition or objection shall not be withdrawn within seven days after the day on which the notice was sent, the contract shall without further notice be rescinded. The Vendor shall thereupon return to the Purchaser his deposit, but without any interest, costs of investigating the title or other compensation or payment whatever.

6. The property is sold subject to all chief and other rents, all incidents of tenure and all easements, liabilities and public rights affecting the same, and to the reservation as legal easements or rights of all privileges or quasi-easements now or heretofore used or enjoyed thereover for the benefit of any adjoining property of the Vendor, whether comprised in the present sale or not, and to any subsisting liability to repair party-walls, fences, roads or streets; and the Vendor shall not be required to define the easements, privileges or quasi-easements, liabilities or public rights to which the

property is subject, and the Purchaser shall take no objection on account of any easement, privilege or quasi-easement, liability or public right known to the Vendor not being mentioned in the Particulars. The property is also sold subject to all leases, tenancies or occupations, whether mentioned in the Particulars or not, and to all rights or claims of lessees, tenants or occupiers. The property is believed to be correctly described as to quantity and otherwise. If any error, misstatement or omission shall be discovered in the Particulars, the same shall not annul the sale, nor shall any compensation be allowed by the Vendor in respect thereof.

21. If the Purchaser shall fail to comply with the above or the Special Conditions, his deposit shall thereupon be forfeited and the Vendor shall be at liberty to re-sell the property at such time in such manner and subject to such conditions as the Vendor shall think fit and any deficiency in price which may happen on and all expenses which may attend the re-sale shall immediately afterwards be paid by the defaulter to the Vendor and in case of non-payment shall be recoverable by the Vendor as liquidated damages."

The abstract of title was delivered on May 20, 1920, and the requisitions were not sent in until June 10, 1920, although they ought to have been sent in within ten days after the delivery of the abstract. They were, however, dealt with as if sent in in due time.

Requisition 15 was as follows: "The property is subject to restrictive covenants. This is not disclosed by the contract, and the purchaser reserves the right to object to the title on this ground."

The answer to this was "See Condition 6."

On June 12, 1920, the purchaser's solicitors wrote to the vendor's solicitors as follows: "We duly received your replies to our requisitions, but, with regard to requisition 15, we cannot agree with you that clause 6, which is a perfectly general condition, covers the point raised. The property is stated to be freehold, and the existence of restrictive covenants is not disclosed in the contract. Under these circumstances our client informs us that he is not inclined to

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proceed with the matter, and we shall, therefore, be much obliged if you will arrange for the return of his deposit."

On June 14, 1920, the vendor's solicitors replied: "We must ask you to state definitely whether your client declines to complete, as if so, our client will immediately proceed in accordance with condition 21."

On June 25, 1920, the purchaser's solicitors wrote a letter in which, after referring to counsel's opinion, they said: "Our client considers that the existence of these restrictive covenants considerably reduces the value of the property, and he is not prepared to proceed with the purchase unless they are removed. We are, therefore, instructed to inform you that, unless your client is willing, either to get these restrictions removed, or to return the deposit and declare the contract at an end, we propose to issue a vendor and purchaser summons, claiming rescission of the contract."

On July 5, 1920, the vendor's solicitors replied, (*a*) referring to condition 6 of the London Conditions of Sale, (*b*) pointing out that the purchaser had taken possession of the property, held an auction there, and cut down trees, (*c*) reminding the purchaser's solicitors that the requisitions were delivered out of time, and (*d*) contending that the statement in the particulars that the property was subject to a yearly rent-charge of 15*l.* was an implied notice of the usual covenants to secure the payment thereof. The letter concluded as follows: "If, in the face of these facts, your client still wishes to proceed to issue a vendor and purchaser summons, we are instructed to accept service. The matter will not, however, permit of further delay, and, unless the purchase is completed, or such proceedings commenced within 14 days from this date, our client will forfeit the deposit, and we shall proceed to re-sell the property under condition 21 of the London Conditions of Sale."

On July 22, 1920, the plaintiff issued a summons under the Vendor and Purchaser Act, 1874, claiming a declaration that a good title had not been shown and an order for the return of the deposit.

On July 29, 1920, the purchaser's solicitors wrote that

"immediately we ascertained the existence of these covenants we took our client's instructions upon the matter, and ultimately received his instructions to refuse to proceed. Your client apparently does not agree that our client is entitled to repudiate the contract on this ground, and consequently we have issued a vendor and purchaser summons in the matter, which we think is the proper course."

On October 28, 1920, the vendor's solicitors wrote to the purchaser's solicitors as follows: "Our client" . . . . "has telephoned to us this morning and informed us that, in view of the length of time which will doubtless elapse before the matter can come before the Court for decision, which possibly but not probably might be adverse to her (the property meanwhile remaining empty and not improving), she is not disposed to continue the litigation. . . . . Under these circumstances she has instructed us to give the purchaser notice (and you will please accept this letter as such notice) that she does not intend to forfeit the deposit under condition 21 of the London Conditions of Sale, but that she hereby gives the purchaser 7 days' notice, under condition 4 thereof, of rescinding the contract, and that, unless the purchaser shall within that period intimate that his requisition is withdrawn, the contract will be rescinded and the deposit returned to him according to the terms mentioned in condition 4. We have told our client that, in taking this course, she should also pay the costs of the vendor and purchaser summons which the purchaser has incurred to date, which she has agreed to do, and the amount of these can doubtless be agreed between us."

The requisition was not withdrawn, and the deposit was returned, but on January 7, 1921, the purchaser commenced the present action against the vendor, alleging that the purchaser had applied to the vendor for payment of his costs and expenses incurred in the investigation of vendor's title, but that she had refused to pay the same, and alleged that, by reason of the notice of October 28, 1920, she was not liable for the same; and the purchaser claimed (1.) a declaration that the vendor was not entitled to rescind the

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contract under that notice; (2.) a declaration that the vendor was liable to pay to the purchaser his costs and expenses incurred in the investigation of the vendor's title, as damages, and also interest on the deposit; (3.) that the damages might be ascertained (if necessary by inquiry), and paid, together with interest at 5 per cent. on the deposit.

Whitmore Richards for the plaintiff. After the purchaser had repudiated the contract, which he did by his letters of June 12 and July 29, 1920, the vendor was not entitled to rescind. The purchaser was entitled to repudiate on discovering the existence of the restrictive covenants, which had not been disclosed when the contract was entered into, and on the repudiation there was no term of the contract left, and therefore the vendor could not proceed under condition 4 of the London Conditions of Sale. In Williams' Vendor and Purchaser, 2nd ed., p. 185, there is the following statement: "But if the vendor fail to show a good title on the face of his own abstract and the purchaser at once repudiate the contract on this ground, it is thought that the vendor cannot then take advantage of a clause in the contract reserving the right to rescind, and so save his liability to pay the purchaser's expenses as damages. For when the vendor has so failed to perform his contract, and the purchaser has at once elected to treat the contract as broken, how can the former any longer claim to exercise a right given by the contract itself? It is held that, where a vendor of land fails to show a good title thereto, he commits such a breach of contract as discharges the purchaser from the duty of performing his part of the agreement and precludes the vendor himself from enforcing any stipulation in his own favour therein contained. The purchaser, on such a breach, is entitled to rescind the whole contract, and every part of it is annulled as against him." That is both good sense and good law; and *Halkett* v. *Earl of Dudley* (1) is not inconsistent with the right of a purchaser to repudiate if he does so promptly. Moreover, even assuming that

(1) [1907] 1 Ch. 590.

the purchaser was not entitled to repudiate, the vendor was not entitled to rescind under condition 4, for the circumstances did not justify the exercise of the power to rescind. The vendor had agreed to sell the property without reference to, and on the face of the contract as if there were no, restrictive covenants, having notice at the time of their existence. Further, the vendor waived her right to rescind, if any, by conceding that the purchaser was entitled to the relief sought for by his summons.

[He also referred to *Isaacs* v. *Towell* (1), and *In re Jackson and Haden's Contract.* (2)]

R. Peel for the defendant. The case is clearly within the terms of condition 4 of the London Conditions of Sale. As to the question of repudiation, on which the purchaser relies, the view expressed in Williams' Vendor and Purchaser, 2nd ed., pp. 185–187, is only the author's opinion, and is opposed to the decision of Parker J. in *Halkett* v. *Earl Dudley* (3), where it was held that a purchaser's right to repudiate the contract is an equitable right arising from want of mutuality, and may be a defence to an action for specific performance; but that, in order to avail himself of that defence, he must repudiate the contract as soon as he finds that the vendor cannot make a good title. Even if Mr. Cyprian Williams' view is correct, the purchaser has not brought himself within it. He did not repudiate at once on discovering the defect in title, for, although the abstract was delivered on May 20, there was no repudiation before July 29. The vendor has done nothing to disentitle him to exercise the right to rescind given by condition 4, which says that the right may be exercised "notwithstanding any negotiation or litigation in respect of such requisition or objection." In *Isaacs* v. *Towell* (1), although the condition contained the words "notwithstanding any intermediate negotiation," it was silent as to intermediate litigation, and yet the vendor was held entitled to rescind, although the purchaser had commenced an action for rescission. If the

(1) [1898] 2 Ch. 285. (2) [1906] 1 Ch. 412.
(3) [1907] 1 Ch. 590.

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words as to litigation had been in the condition, no question of waiver would have arisen. A vendor can rescind under a condition enabling him to do so at any time before judgment: *In re Spindler and Mear's Contract.* (1) And, as the vendor has paid the purchaser's costs of the summons, the latter is in no worse a position than he would have been if the vendor's right to rescind had been exercised in June.

In re Jackson and Haden's Contract (2) and *Nelthorpe* v. *Holgate* (3) are distinguishable, for in both cases the vendors had actual notice of the defect in title and the conditions allowed compensation in case of misdescription. Here the vendor had no actual knowledge as to the restrictive covenants, and the omission to refer to them in the particulars or conditions was a mere slip. Different considerations arise where there is a provision that the purchaser may receive compensation for misdescription. *In re Deighton and Harris's Contract* (4) shows that the object of such a condition is to protect vendors from the consequences of such innocent omissions. There is no hardship on the purchaser, inasmuch as he knew of the vendor's right to rescind. There is no question of recklessness as in *In re Jackson and Haden's Contract.* (2) The real question is whether the condition can be construed in the circumstances as applying to the particular state of facts which has caused the difficulty. (5) Vendors have been allowed to rescind in many stronger cases than this: *Heppenstall* v. *Hose* (6); *In re Ramuz and Edwards's Contract* (7); *In re Great Northern Ry. Co. and Sanderson.* (8)

SARGANT J. This is an action by a purchaser for a declaration that the vendor is not entitled to rescind the contract between them; and, as damages, for the costs and expenses of investigating the title.

The contract was dated April 30, 1920, and contained no special conditions of importance, but it incorporated by

(1) [1901] 1 Ch. 908.
(2) [1906] 1 Ch. 412.
(3) (1844) 1 Coll. 203.
(4) [1898] 1 Ch. 458.
(5) [1906] 1 Ch. 419.
(6) (1884) 33 W. R. 30.
(7) (1893) 37 Sol. J. 701.
(8) (1884) 25 Ch. D. 788.

reference the London Conditions of Sale. Those of them which were relied on by the vendor are numbered 4, 6 and 21. [His Lordship read the three conditions, and continued.] The abstract of title was sent to the purchaser's solicitors on May 20, 1920. The requisitions were sent in on June 10, 1920. They were out of time, but this was not insisted on by the vendor and I will deal with them as if they had been delivered within the time limited by the special conditions. Requisition 15 [which his Lordship read] was on the subject of non-disclosure of the restrictive covenants affecting the purchased property. On June 12, 1920, the purchaser's solicitors wrote to the vendor's solicitors stating that, as the existence of the restrictive covenants was not disclosed in the contract, the purchaser was not inclined to proceed with the matter, and asking for a return of the deposit. On July 29, 1920, the purchaser's solicitors again wrote, referring to the purchaser's refusal to proceed and repudiation of the contract, and stating that they had taken out a vendor and purchaser summons. The summons was taken out on July 22, 1920, and by it the purchaser claimed a declaration that a good title had not been shown, and return of his deposit. The purchaser in the meantime did obtain a sort of possession of the purchased property, but not such as to be a waiver of his requisition. It seems doubtful whether so far the letters of the vendor's solicitors amounted to a threat to cancel the contract, but on October 28, 1920, they wrote saying that the vendor was not disposed to continue the litigation, and that she did not intend to forfeit the deposit; and seven days' notice (under condition 4 of the London Conditions of Sale) was given cancelling the contract unless the requisition was withdrawn. The deposit was returned by the vendor, who also paid the purchaser's costs of the litigation, which was not further proceeded with. In the present action the purchaser claims to be paid the costs and expenses incurred in the investigation, and denies that the vendor could rescind the contract under condition 4 of the London Conditions of Sale, and says that on this point the contract was an open contract.

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There are three grounds on which the purchaser relies in saying that the vendor cannot rescind: (1.) That this is not a case to which condition 4, on its true construction, applies; (2.) That before notice to cancel the contract was given the purchaser had, by repudiating the contract, put an end to it, and that every clause of it was gone. (3.) That, under the circumstances, and especially having regard to condition 21 of the London Conditions of Sale, it would be inequitable to allow the vendor to rescind.

As to the first ground: in *In re Jackson and Haden's Contract* (1), on which the purchaser relied, the vendor actually knew that there were no mines or minerals, their absence not being shown in the contract of sale, and the Court's decision that the vendor was not entitled to rescind was founded on the vendor's recklessness, it being held that a condition giving power to rescind could not be insisted on so as to cover recklessness. The words "recklessness" and "reckless" are scattered all over the judgment of Collins M.R. He says (2): "Now, what is the element that the Vice-Chancellor is seeking for there (3) which determines the case? It seems to me to be an element of something on the part of the vendor less than the law requires of him in such cases. It may stop short of fraud, it may be consistent with honesty; but, at the same time, there must be a falling short on his part—he must have done less than an ordinarily prudent man, having regard to his relations to another person, when dealing with him, is bound to do; and therefore where, knowing the exact facts, he has recklessly made a description of them which would mislead another person who did not know as much as himself (even though he thought that person might know as much as himself), there is a clear failure of duty on the part of the vendor which fairly disentitles him to say that a clause introduced into a contract for his benefit is introduced to meet such a case as that which has arisen here, namely, a reckless disregard by the vendor of his duty as to accuracy of statement when he is making a statement with a view to other

(1) [1906] 1 Ch. 412.
(2) [1906] 1 Ch. 421.
(3) In *Nelthorpe* v. *Holgate*, 1 Coll. 203.

people acting on it as correct. On that ground it is enough to say that this particular condition must be read (as against the persons who are taken to have introduced it and introduced it for their own benefit) as not applying to the particular case to which they seek to apply it, namely, something arising wholly and solely out of their own recklessness in the manner in which they have formulated the contract." And later on (1) he says: "In every case where the vendor was allowed to avail himself of a stipulation like this, there was always absent that element of shortcoming on his part which, though falling short of fraud, or dishonesty, might be described as 'recklessness.' . . . . . In none of the cases in which the vendor was allowed to avail himself of that condition was there anything which could be really imputed to the vendor as at all in the nature of recklessness, much less of fraud or dishonesty." Romer and Cozens-Hardy L.JJ. agreed with the decision of the Master of the Rolls, but did not state their views so fully.

There has been no recklessness on the part of the vendor in this case. The property was known to be subject to restrictive covenants, but that did not affect his power to give the purchaser a habitable house. It is sometimes for the benefit of a house in a residential property that there should be restrictive covenants affecting that property. They were meant to preserve the amenities of the neighbourhood. There has been no recklessness on the part of the vendor depriving her of the right to rely on condition 4 of the London Conditions of Sale.

As to the ground that the purchaser had repudiated or rescinded the contract so that condition 4 had come to an end with the rest of the contract the purchaser relies on the statement in Williams' Vendor and Purchaser, 2nd ed., 185, that "if the vendor fail to show a good title on the face of his own abstract and the purchaser at once repudiate the contract on this ground, it is thought that the vendor cannot then take advantage of a clause in the contract reserving the right to rescind, and so save his liability to pay the purchaser's

(1) [1906] 1 Ch. 422.

SARGANT J. 1921 PROCTER v. PUGH.

expenses as damages." Mr. Cyprian Williams' book is an excellent work, containing many valuable suggestions and criticisms, but his view on this point cannot prevail in a case like this. It is absolutely opposed to the view taken by Parker J. in *Halkett* v. *Earl of Dudley*. (1) In his note at p. 186 Mr. Williams sets to work to attack the soundness of the view of Parker J., who says (2) "it is reasonably clear . . . . that, before decree, a purchaser who becomes aware of a defect in the vendor's title, which defect cannot be removed without the concurrence of a third party whose concurrence the vendor has no power to require, may (except possibly in the case of trifling matters which the Court would at the vendor's instance treat as matters of compensation or abatement of purchase-money) repudiate his contract, and that such repudiation will be a bar to any relief being subsequently given by way of specific performance at the vendor's instance, even though the defect has been removed before trial. I do not think that this right is more than an equitable right affecting the equitable remedy by way of specific performance."

If Mr. Cyprian Williams' view were pushed to its logical conclusion, condition 4 would be almost inoperative, for if once the purchaser took a good objection to the title disclosed the vendor could not use the clause. The only prima facie right of the purchaser is to say that he refuses to pay the purchase-money, and then, in the absence of such a condition, he would be entitled, as damages, to the costs and expenses of investigating the title. And it is precisely this right that is negatived by the condition. In my judgment, objection 2 fails.

Objection 3 might be sustained if the vendor were not acting bona fide, or were trying to squeeze the purchaser. But there is nothing like that here. The vendor wanted to bring the matter to a head, and condition 4 enabled that to be done. A vendor and purchaser summons was taken out in July, and no intention to rescind was then shown. After the Long Vacation, notice to rescind was given. Why

(1) [1907] 1 Ch. 590. (2) [1907] 1 Ch. 596.

has the objection been removed from the class of objections referred to in condition 4? The vendor finds that the difficulty as to the restrictive covenants cannot be removed. She realizes that the objection taken to the title by the purchaser is valid, and tells him that he must withdraw his requisition or she will rescind the contract under condition 4—which is a common form condition inserted to prevent the vendor from having to comply with onerous requisitions.

Many cases were cited. In *Isaacs* v. *Towell* (1) the words "notwithstanding any . . . . litigation," which are present in condition 4, were absent. In *In re Deighton and Harris's Contract* (2) the question was whether the condition as to rescission applied to a matter of conveyance as well as of title. There are other cases where the vendor's power to rescind was allowed to be exercised under stronger circumstances than those in the case before me, which is hardly more than a storm in a teacup. On objection 3 I must hold that, far from acting unreasonably, the vendor acted reasonably, and for her own protection, under condition 4. No one has been hurt by the vendor's delay in rescinding, and the action must be dismissed with costs.

Solicitors for plaintiff: *J. & C. Dodd.*
Solicitors for defendant: *Avery & Wolverson.*

(1) [1898] 2 Ch. 285. (2) [1898] 1 Ch. 458.

F. E.

ASTBURY J.

1921

July 7.

DAVENPORT *v.* SMITH.

[1920. D. 1782.]

Landlord and Tenant—Lease—Breach of Covenant—Right of Re-entry—Conveyance of Reversion—Subject to and with Benefit of Lease—Purchaser's Knowledge of Breach—Waiver—Conveyancing Act, 1911 (1 & 2 *Geo.* 5, *c.* 37), *s.* 2.

With full knowledge that a couple of sheds had recently been erected on leasehold property in breach of the lessee's covenants, the plaintiff bought and took a conveyance of the reversion subject to and with the benefit of the lease. The conveyance recited that the vendor was seised in fee simple subject to the lease. The vendor had not waived the breach:—

Held, that by showing a clear recognition of the subsistence of the lease on his purchase, the plaintiff had waived the right of re-entry for the past breach.

Hunt v. *Remnant* (1854) 9 Ex. 635 and *Matthews* v. *Smallwood* [1910] 1 Ch. 777 applied.

Witness Action.

By a lease dated October 6, 1908, the Shoreham and Lancing Land Co. demised a certain piece of freehold land at Shoreham on which a bungalow stood to the defendant's predecessor for thirty-five years from September 29, 1908, at an annual rent of 6*l.* 10*s.* and a sanitary fee of 1*l.* 5*s.* payable in advance on June 24 in each year.

The lessee covenanted (inter alia) not to erect any structure or building on the premises other than a conservatory at the back or side of the existing bungalow (the plan and elevation being first approved by the lessor) and not to make any alterations in the plan and elevations of the bungalow without the lessor's written consent, which consent and approval should not be unreasonably withheld. The lease contained the usual proviso for re-entry on breach of covenant. The lessee might remove the bungalow during the last six months of the tenancy.

On August 3, 1911, the freehold reversion was conveyed to Freehold Dwellings, Ld., hereinafter called the Freehold Company, and on November 22, 1912, the lease was assigned to the defendant.

Shortly before April 28, 1920, the defendant erected a shed at each end of the bungalow without the Freehold Company's written consent. She had however first shown the plans to a local firm who collected the rent and believing they were the Freehold Company's agents thought their approval was sufficient.

On April 28, 1920, the Freehold Company complained of the breach, but on May 28, 1920, before any steps were taken to enforce the right of re-entry the plaintiff, who knew of the breach, contracted to buy the property subject to and with the benefit of the lease. The purchase was to be completed on June 24.

On July 8, 1920, the Freehold Company conveyed the property to the plaintiff subject to and with the benefit of the lease. The conveyance contained a recital that the vendor was seised in fee simple of the property subject to that lease.

On July 20, 1920, the plaintiff gave the defendant notice under the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), s. 14, requiring her to remedy the breach but not specifying clearly what he required to be done.

On October 1, 1920, the plaintiff commenced this action for possession.

In addition to relying on the insufficiency of the notice, the defendant contended that by accepting a conveyance subject to and with the benefit of the lease with full knowledge that the right of entry had already become enforceable the plaintiff had waived the right to re-enter in respect of the past breach. The latter point is alone reported.

Hildyard K.C. and *G. D. Johnston* for the plaintiff. The Conveyancing Act, 1881, s. 10, provides that the benefit of the lessee's covenants and every condition of re-entry shall run with the reversion. It did not however apply to breaches committed before the assignment of the reversion: *Cohen* v. *Tannar*. (1) That has been remedied by the Conveyancing Act, 1911, s. 2, which provides (sub-s. 1) that

(1) [1900] 2 Q. B. 609.

ASTBURY J. 1921 DAVENPORT v. SMITH.

s. 10 aforesaid shall apply to the benefit of every condition of re-entry or forfeiture for a breach of any covenant or condition in a lease so as to enable the same to be enforced by the person entitled "subject to the term" to the income of the land leased, "although that person became . . . . so entitled after the condition of re-entry or forfeiture had become enforceable."

Sub-s. 2 provides that this section shall not render enforceable any condition of re-entry or other condition waived or released "before" the person became entitled as aforesaid. In other words it does not revive a condition previously waived. There is no suggestion of previous waiver here. No express assignment of the condition is necessary, and even if it were necessary the assignment "with the benefit of" the lease would pass it. The suggestion that the conveyance itself amounts to waiver is absolutely untenable.

Luxmoore K.C. and *R. L. Ramsbotham* for the defendant. By accepting a conveyance subject to and with the benefit of the lease the plaintiff clearly recognized the subsistence of the lease notwithstanding the known breach of covenant. That is a waiver of that past breach and the right of re-entry in respect thereof: *Hunt* v. *Bishop* (1); *Hunt* v. *Remnant* (2); *Matthews* v. *Smallwood.* (3)

Sect. 2 of the Conveyancing Act, 1911, merely removes the assignee's disability to enforce a right of re-entry accrued before the assignment. It does not prevent him from waiving it.

Hildyard K.C. in reply. In *Hunt* v. *Bishop* (1) the assignee of the reversion sued the lessee for possession in respect of a past breach. It was held that there had been no breach, and that, even if there had been, the right of re-entry was not assignable. The suggestion that the conveyance subject to the lease was in itself a waiver was the barest dictum.

In *Hunt* v. *Remnant* (2) the same points arose between the assignee of the reversion and the lessee's mortgagee. The

(1) (1853) 8 Ex. 675, 678, 680. (2) 9 Ex. 635, 641.
(3) [1910] 1 Ch. 777, 786.

Court did not deal with them but held that even if the right of re-entry was assignable it had not been assigned. In that case the assignment was merely "subject to" and not "with the benefit of" the lease.

In *Matthews* v. *Smallwood* (1) Parker J. no doubt says that any unequivocal act by the lessor recognizing the continued existence of the lease is a waiver of known breaches. But the examples he gives—namely, distress or receipt of rent—show that he was clearly thinking of some act touching the lessee or the person paying the rent, and not a mere res inter alios acta such as the conveyance of the reversion.

In the present case the lease was of course recognized quantum valeat as between the lessor and the plaintiff, but there was no recognition or waiver in favour of the lessee. The conveyance simply left matters in statu quo.

ASTBURY J. [after stating the facts and holding that the plaintiff's action clearly failed on the ground of the insufficiency of the notice, continued:] I am asked however also to decide the second point—namely, whether the proviso for re-entry has been waived.

The plaintiff contends that s. 2 of the Conveyancing Act, 1911, entitles him to rely on the proviso for re-entry, although he took his assignment with knowledge that it was already enforceable. The defendant contends that the assignment was a waiver in law of the known right of re-entry, and that the section has no application.

Now s. 2 in effect provides that the benefit of a condition already broken shall run with the reversion, unless waived or released before the assignment of that reversion. That is its sole effect. It does not touch the question of waiver or release by the assignee.

In *Hunt* v. *Remnant* (2) Coleridge J., referring to the assignment of a reversion subject to a lease after a breach of covenant committed, said: "If, by the operation of the [Real Property Act, 1845] 8 & 9 Vict. c. 106, the right of entry supposed to be in [the assignor] was incapable of passing, there

(1) [1910] 1 Ch. 777, 786. (2) 9 Ex. 635, 641.

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is an end of the question; but if it was capable of passing, there is no reason to suppose that such an interest was intended to pass, or did in fact pass. The assignment contains no words in express terms passing it . . . . and . . . . we think that the parties had no intention, and that there are no sufficient words to pass that interest. There are only two suppositions, one, that the parties had knowledge of the forfeiture, the other, that they were ignorant of it. If it was known to them, there are no words showing that knowledge, but on the contrary, they recognise the agreements and underleases, and convey subject to them. On the other hand, if they did not know of the forfeiture, there is less reason to suppose that they intended to pass the right of entry. Upon this short ground, without entering into the other points, we think that the judgment of the Court below must be affirmed."

This is a recognition of the principle laid down in other cases that, where the assignor and assignee of a reversion know of a previous breach of covenant, an assignment of the reversion in terms recognizing the subsistence of the lease is a waiver of the right to treat it as non-existent by enforcing the right of re-entry.

In *Matthews* v. *Smallwood* (1) Parker J. said: "Waiver of a right of re-entry can only occur where the lessor, with knowledge of the facts upon which his right to re-enter arises, does some unequivocal act recognising the continued existence of the lease. It is not enough that he should do the act . . . . unless, at the time when the act is done, he has knowledge of the facts under which . . . . his right of entry arose. Therefore . . . . though an act of waiver operates with regard to all known breaches, it does not operate with regard to breaches . . . . unknown to the lessor. . . . . Whether the act, coupled with the knowledge, constitutes a waiver is a question which the law decides, and therefore it is not open to a lessor who has knowledge of the breach to say 'I will treat the tenancy as existing, and I will receive the rent, or I will . . . . distrain; but . . . . all I shall do will be without

(1) [1910] 1 Ch. 777, 786.

prejudice to any right to re-enter, which I intend to reserve.' That is a position which he is not entitled to take up. If, knowing of the breach, he does distrain, or does receive the rent, then by law he waives the breach. . . . . Logically, therefore, a person who relies upon waiver ought to shew, first, an act unequivocally recognising the subsistence of the lease, and, secondly, knowledge of the circumstances from which the right of re-entry arises at the time when that act is performed."

In the present case the plaintiff, who entered into his contract with full knowledge of the circumstances under which the right of re-entry had become enforceable, has shown by the recital and habendum in his conveyance an unequivocal recognition of the subsistence of the lease. That is a clear waiver of his right to treat it as non-existent by enforcing that past right of re-entry.

The plaintiff therefore fails on this ground also and his action will be dismissed with costs.

Solicitors: *Bishop & Fenton-Jones; Geoffrey B. Gush.*

NOTE.—As to a reversioner's confirmation or otherwise of a life tenant's void lease see *Smith* v. *Widlake* (1877) 3 C. P. D. 10.

G. R. A.

P. O. LAWRENCE J.

1921

June 1, 14.

In re H. J. WEBB AND COMPANY (SMITHFIELD, LONDON), LIMITED.

[00259 of 1920.]

Company—Voluntary Liquidation—Debt due to Food Controller—Crown Debt—Priority—Prerogative of the Crown—Rule in Bankruptcy—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 133—*Judicature Act*, 1875 (38 & 39 *Vict. c.* 77), *s.* 10—*Preferential Payments in Bankruptcy Act*, 1888 (51 & 52 *Vict. c.* 62), *s.* 1—*Companies (Consolidation) Act*, 1908 (8 *Edw.* 7, *c.* 69), *ss.* 186, *sub-s.* 1, 207, 209, *sub-s.* 1 (*a*)—*Bankruptcy Act*, 1914 (4 & 5 *Geo.* 5, *c.* 59), *ss.* 33, 151—*New Ministries and Secretaries Act*, 1916 (6 & 7 *Geo.* 5, *c.* 68), *ss.* 3, 4.

The prerogative right of the Crown in the winding up of a company to payment of its debt in priority to all the other creditors of the company has not in the absence of an express statutory provision been abrogated by the Companies (Consolidation) Act, 1908, merely because ss. 186, sub-s. 1, 207 and 209, sub-s. 1 (*a*), of that Act respectively in substance re-enact and incorporate in the Act s. 133 of the Companies Act, 1862, s. 10 of the Judicature Act, 1875, and s. 1 of the Preferential Payments in Bankruptcy Act, 1888.

The principle of *In re Henley & Co.* (1878) 9 Ch. D. 469 applied.

Adjourned Summons.

This was an application by the Food Controller claiming that a debt due to him by the company was entitled to payment in priority to all the other debts of the company on the ground that it was a Crown debt in these circumstances.

By s. 3 of the New Ministries and Secretaries Act, 1916, the Ministry of Food was established for the purpose of economising and maintaining the food supply of the country during the war. By s. 11 the Minister of Food might describe himself as the Food Controller. Sect. 4 provided: "It shall be the duty of the Food Controller to regulate the supply and consumption of food in such manner as he thinks best for maintaining a proper supply of food, and to take such steps as he thinks best for encouraging the production of food, and for those purposes he shall have such powers or duties of any Government Department or Authority, whether conferred by statute or otherwise, as His Majesty may, by Order in Council, transfer to him, or authorise him to exercise or perform concurrently with, or in consultation with, the

Government Department or Authority concerned, and also such powers as may be conferred on him by regulations under the Defence of the Realm Consolidation Act, 1914, and regulations may be made under that Act accordingly."

Under these statutory provisions and regulations the Food Controller appointed the company one of his agents on commission for the sale and distribution of frozen rabbits imported by the Board of Trade under contracts with certain State Governments in Australia. The company made contracts for sale on behalf of the Food Controller, delivered to the respective purchasers the rabbits sold under such contracts, collected the purchase moneys, and was bound to account to the Food Controller for and to pay him the amounts so collected less the agreed commission. On July 9, 1920, the company went into voluntary liquidation, and at that date owed the Food Controller 9689*l.* 5*s.* 10*d.* for amounts so collected. The company was insolvent. The Food Controller lodged a proof in the winding up for the 9689*l.* 5*s.* 10*d.*, and claimed that it was due and payable to him on behalf of His Majesty, and was a debt due to the Crown and entitled to payment in priority to all the other creditors of the company. The liquidator admitted the proof, but did not admit that the debt was a Crown debt; alternatively he alleged that, if it were a Crown debt, it was only entitled to dividend pari passu with all the other creditors of the company. The Food Controller issued a summons to determine the matter.

Roland Burrows (*Sir Gordon Hewart A.-G.* with him) for the Food Controller. On the evidence the debt is a simple contract debt due to the Crown: Robertson on the Crown, p. 144. It is settled law that the Crown has a prerogative right in the winding up of a company to be paid in full in priority to all the other creditors of the company, and that the provisions of the Bankruptcy Acts do not apply: *In re Henley & Co.* (1); *In re Oriental Bank Corporation* (2); *In re Galvin* (3); and the Crown has not waived its

(1) 9 Ch. D. 469, 481. (2) (1884) 28 Ch. D. 643, 647.
(3) [1897] 1 I. R. 520, 528.

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prerogative by proving for the debt in the winding up: *In re Henley & Co.* (1); *New South Wales Taxation Commissioners* v. *Palmer.* (2)

Sir J. Simon K.C., R. M. Montgomery K.C. and *L. W. J. Costello* for the liquidator. The debt due to the Food Controller is not a Crown debt, even if the company was bound to pay him the proceeds of the rabbits sold, because he was acting ultra vires his statutory powers in buying and selling rabbits. He was a servant of the Crown and his duty was to regulate the prices at which the imported rabbits were to be sold, and not to act as a trader himself. But if it is a Crown debt, the principle of *In re Henley & Co.* (3) does not now apply. That case and *In re Oriental Bank Corporation* (4) were decided before the Preferential Payments in Bankruptcy Act, 1888, was passed. The effect of that Act and s. 10 of the Judicature Act, 1875, and s. 150 of the Bankruptcy Act, 1883, which is re-enacted by s. 151 of the Bankruptcy Act, 1914, was to take away the priority of the Crown except in certain specified cases, but this rule in bankruptcy did not apply to companies in liquidation so long as the Companies Act, 1862, existed, because the Crown was not specially mentioned in that Act. But it is submitted that the priority of the Crown has now by necessary implication been taken away by the Companies (Consolidation) Act, 1908, because s. 133 of the Companies Act, 1862, s. 10 of the Judicature Act, 1875, and s. 1 of the Preferential Payments in Bankruptcy Act, 1888, are respectively re-enacted and incorporated in the Act of 1908 by ss. 186, sub-s. 1, 207 and 209, sub-s. 1 (*a*), of that Act. [They also referred to *In re Leng* (5); *In re Heywood* (6); *In re Whitaker.* (7)]

Roland Burrows in reply.

Cur. adv. vult.

June 14. P. O. LAWRENCE J. Notwithstanding the arguments addressed to me on behalf of the liquidator to

(1) 9 Ch. D. 459, 482.
(2) [1907] A. C. 179, 184–5.
(3) 9 Ch. D. 469.
(4) 28 Ch. D. 643.
(5) [1895] 1 Ch. 652.
(6) [1897] 2 Ch. 593.
(7) [1901] 1 Ch. 9.

the contrary, I am clearly of opinion that the debt in question is a debt due to the Crown. It was incurred by the company in respect of the sale of certain frozen rabbits imported by the Government during the war, which rabbits were sold, on the instructions of the Food Controller, by the company acting as selling agents for the Government. The rabbits were undoubtedly Crown property. The company on the receipt of the proceeds of sale became accountable therefor to the Food Controller, who had no personal interest in such proceeds, but was merely acting in the matter as a servant of the Crown. In the circumstances it appears to me to be immaterial to inquire into the exact extent of the Food Controller's authority to give the instructions for sale. The Crown has not questioned his authority, and therefore the company cannot, in my judgment, set up any want of authority on his part either as entitling the company to retain the proceeds of sale for its own use or as converting the debt into a debt due to the Food Controller as a private individual.

It remains to be considered whether the Crown is entitled to priority in respect of this debt. In my judgment this point is definitely concluded in favour of the Crown by the decision in *In re Henley & Co.* (1) which is binding upon me. It was contended by counsel on behalf of the liquidator that I ought not to give effect to the claim of the Crown to priority because the Crown has chosen to put forward its claim in the winding up. A similar point was taken in *New South Wales Taxation Commissioners* v. *Palmer* (2), but was summarily rejected as not affording any answer to the claim. In the present case it is abundantly clear that the Crown has all along insisted on its prerogative rights and, that being so, it would be wrong to hold that it has abandoned such rights merely because it has adopted the present convenient method of enforcing them. It was next contended that *In re Henley & Co.* (1) ought no longer to be followed, first, because since it was decided the Court has taken a wider view as to the effect of the words "the rules as to debts and

(1) 9 Ch. D. 469. (2) [1907] A. C. 179, 185.

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liabilities provable" in s. 10 of the Judicature Act, 1875, than that which prevailed in the year 1878: see *In re Leng* (1); and secondly, because of the passing of the Preferential Payments in Bankruptcy Act, 1888. In my opinion the cases of *In re Galvin* (2) and *New South Wales Taxation Commissioners* v. *Palmer* (3) (in both of which *In re Henley & Co.* (4) is treated as still accurately stating the law) show that neither the alleged change in the interpretation of s. 10 of the Judicature Act, 1875, nor the passing of the Act of 1888 has had the effect of abrogating the prerogative right of the Crown in respect of its debts in circumstances like the present. The last point taken on behalf of the liquidator is that the Companies (Consolidation) Act, 1908, has extinguished the prerogative right of the Crown to priority in respect of its debts in a winding up. It is argued that the effect of that Act is to place the administration of the assets in a winding up on the same footing as the administration of a bankrupt's estate, and that, whatever priority the Crown may have been entitled to before that Act was passed, has been taken away by that Act. In my judgment that contention also fails. The sections relied upon are ss. 186, sub-s. 1, 207 and 209, sub-s. 1 (*a*). Sect. 186, sub-s. 1, in substance re-enacts s. 133 of the Companies Act, 1862; s. 207 in substance re-enacts s. 10 of the Judicature Act, 1875; and s. 209, sub-s. 1, in substance re-enacts s. 1 of the Preferential Payments in Bankruptcy Act, 1888. If I were to accede to this argument, I would be giving a wider effect to the provisions of those sections than has heretofore been given to them merely because they are grouped together in one Act instead of being contained in different Acts. This I do not feel myself at liberty to do. If the Legislature had intended to extinguish the undoubted prerogative of the Crown, it ought, in my judgment, to have done so in express language, and I should have expected to have found in the Act at least some such provision as is contained in s. 151 of the present Bankruptcy Act, 1914. In my judgment the Act of 1908,

(1) [1895] 1 Ch. 652.
(2) [1897] 1 I. R. 520.
(3) [1907] A. C. 179.
(4) 9 Ch. D. 469.

construed in the light of the authorities I have mentioned, does not abrogate the prerogative rights of the Crown as defined by the Court of Appeal in *In re Henley & Co.* (1) The Crown is therefore entitled to the priority claimed by the summons.

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Solicitors : *Solicitor to Board of Trade ; F. C. Mathews & Co.*

H. L. F.

In re LLEWELLYN'S SETTLEMENT.

OFFICIAL SOLICITOR *v.* EVANS.

RUSSELL J.
1921
June 7.

[1921. L. 1132.]

Settlement—Power to appoint—No Limitation in Default.

By marriage settlement property of the wife was vested in trustees on trust for her for life, then for her husband for life if he survived—which he did not—and upon the death of the survivor, if there should be any child or children, to grant, convey and transfer to such child or children or their issue in such shares as she by deed or will should appoint, such shares to be payable to such child or children as they respectively should attain twenty-one or if a daughter marry under that age, and in case there should be no more than one such child for such only child, and, in case no issue should attain twenty-one or marry as aforesaid, over. There was no limitation in default of appointment. She died without exercising the power, leaving adult children and infant grandchildren :—

Held, that the property went to them equally per capita.

Whether, if a grandchild had predeceased her, his legal personal representative would have taken, *quaere*.

Wilson v. *Duguid* (1883) 24 Ch. D. 244; *Lambert* v. *Thwaites* (1866) L. R. 2 Eq. 151 ; *In re White's Trusts* (1860) John. 656 followed.

In re Weekes' Settlement [1897] 1 Ch. 289 distinguished.

SUMMONS.

In 1878 a settlement was made on the marriage of William Tudor Llewellyn and Alice Gertrude White. The deed was lost before 1896, but the plaintiff exhibited to his affidavit a document which was indorsed 'Copy Settlement" and

(1) 9 Ch. D. 469.

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appeared to be a copy made in 1886 of a draft obtained from the solicitor who prepared the settlement. Russell J. held that the document might be taken as sufficient evidence of the contents and provisions of the settlement.

By the settlement which was dated April 20, 1878, certain real and personal property belonging to the wife was vested in trustees on trust to receive or permit the wife to receive the income for her life for her sole use and after her decease in the event of the husband surviving (which event did not happen) on trust to pay the income to him for life. It then proceeded: "And upon the death of the survivor of them if there shall be any child or children the issue of the said intended marriage" (which event happened) "upon trust to grant convey pay transfer and set over all the real and personal estate and all monies rents interest dividends and proceeds arising therefrom to such child or children or their issue in such shares and proportions and subject to such restrictions and conditions and generally in such manner as the said Alice Gertrude White by any deed or instrument in writing with or without power of revocation and new appointment or by her last will and testament shall from time to time direct limit or appoint such shares and proportions to be payable to such child or children as he she or they respectively shall attain the age of twenty-one years or if a daughter marrying within that age with the consent of her parent or guardian And in case there shall be no more than one such child then subject as aforesaid upon trust for such only child his or her heirs executors administrators or assigns Provided always (but subject as aforesaid) and in case there should be no issue of such intended marriage who should live to attain the age of twenty-one years or marry as aforesaid" upon further trust not material to set out as the event did not happen.

The deed did not contain any clause providing for default of appointment, nor any hotchpot, or maintenance, or advancement clause.

The husband died in 1916.

The wife died in 1918.

There were seven children of the marriage of whom two had died in infancy and five attained the age of twenty-one and were surviving and defendants. There were also three grandchildren living at Mrs. Llewellyn's death, who were infant defendants.

No appointment in exercise of the wife's power had been made.

The plaintiff (judicial trustee) took out a summons to determine whether the trust property (which was represented by a sum of stock) was divisible (*a*) equally between the five children or (*b*) equally between the five children and three grandchildren or (*c*) payable to the wife's legal representative, or how otherwise.

Winterbotham for the plaintiff stated the case.

H. M. Humphry for the children. There is sufficient indication in the deed to enable the Court to imply a gift in favour of all the children in default of appointment. If, as was the case, the settlor meant an only child, if there should be only one, to take the whole fund, it is not to be supposed she meant none of them to take if there were more than one.

Wilfrid Hunt for the grandchildren. This being a case of gift to children and issue as a class with a power of selection given to the wife, and there being no exercise of the power of appointment, the original gift to the class remains and the children and grandchildren take per capita in eighths: Farwell on Powers, 3rd ed., p. 528; *Wilson* v. *Duguid* (1); *Lambert* v. *Thwaites* (2); *In re White's Trusts.* (3) The period of ascertaining the class is the death of the wife, she being both tenant for life and donee of the power to appoint. The implication or supplying of gifts in default is not limited to wills but is applicable also in the case of settlements, though it is more easily applied in the case of wills. Really it is not a question of implying or supplying a gift, but is a matter of construction. As the intention is to benefit a class by appointment, the members of the class take

(1) 24 Ch. D. 244. (2) L. R. 2 Eq. 151.
(3) John. 656.

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if there is no appointment. The children who attain twenty-one and grandchildren born before the wife's death and surviving her take.

Langford Lewis for the wife's representative. The matter is altogether too doubtful for the Court to imply anything: *In re Weekes' Settlement.* (1) The Court should hold that there is a resulting trust for the wife. It is true that Farwell on Powers, 3rd ed., p. 530, does not altogether approve of the decision in *In re Weekes' Settlement.* (1)

RUSSELL J. [after stating the trusts set out above]. The settlement does not contain all the limitations usual in marriage settlements. It is clear that something has slipped out or been overlooked. I am not asked, nor am I in a position, to rectify the settlement and supply what is omitted. All I can do is to see whether I can construe the trusts as they stand, and endeavour to find out who is now entitled to the trust fund. Three contentions were put before me. It was argued—for the children of Mrs. Llewellyn—that there is sufficient in the words used for the Court to imply a gift in favour of all the children in default of appointment; for the grandchildren, that there is a gift to the children and their issue as a class, with a power of selection given to Mrs. Llewellyn, and that in default of appointment the original gift remains and the grandchildren take equally with the children in eighths; for the legal personal representative of the wife, that the Court cannot make anything of the document except that there is no trust for the children or grandchildren but a resulting trust to Mrs. Llewellyn. In my opinion the second contention is correct. I cannot find anything to justify the implication of a gift in favour of the children only. I think the words "or their issue" must be read "and their issue." Read strictly, "or their issue" makes some sense of a sort. It would mean that an appointment had to be made either to the children or only to their issue. I think that is untenable. I think the words must be construed as a gift to the children and their issue as the wife may appoint, with

(1) [1897] 1 Ch. 289.

a limitation that the children can only take if they attain twenty-one or in the case of daughters marry with consent, followed by a provision that if there is only one child who shall comply with the conditions that one child shall take. I think there is no room for any implication in favour of the five children.

In support of the second contention three authorities were cited to me by Mr. Hunt which I think are conclusive of the matter. In *Wilson* v. *Duguid* (1), which was a case of a settlement, a leasehold house was assigned to trustees upon trust for A. for life, and after her decease for B. (her husband) for life, and after the decease of the survivor upon trust to assign the premises unto and amongst such of the children of A. and B. then living in such manner, shares, times, and proportions as A. and B. jointly or the survivor separately should by any writing appoint, and in case there should be no such child or children then upon trust for C. for life, and after his decease upon trust—and this is material—to assign the premises unto and amongst such of his children and in such manner, shares, times, and proportions as he should by any writing appoint. A. died without leaving issue. Then B. died. C. had died before A. without having exercised the power of appointment, having had ten children of whom three died before him, two after him and before the death of A., and one after the death of A. and before that of B. The limitations in that case are very like those in the present case except that there the trust was for children only while here it is for children or their issue. Chitty J. decided that all the children of C. took as tenants in common in equal shares. He says (2): "On the true construction of this settlement, so far as it relates to the children of Robert Keeling the younger"—that was C.—"I hold that there is a trust for all the children of Robert in equal shares, subject to a power of selection and distribution exercisable by him either by deed inter vivos or a testamentary instrument. That appears to me to be the plain meaning of the words I have read. The whole of the property is vested in trustees,

(1) 24 Ch. D. 244. (2) 24 Ch. D. 248.

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there is contained a trust in the words 'upon trust to assign' distinguishable from the power which is conferred upon Robert Keeling the younger. The objects of the power are not any of the children, though there is a power of selection and a power to exclude, not particular children of Robert, but all his children. There is no time limited for the execution of the power, and it was not more or less his duty to exercise the power just before his death than it was to exercise it at any other time. If it is necessary to resort to technical reasoning, I hold that there is a plain implication from the words I have read of a trust in default of appointment for all the children of Robert. I do not think it is necessary to refer to the other technical grounds put forward in some of the cases on the subject, namely, that there was a power which it was the duty of the trustees to exercise, and the Court could only fasten upon the power in this way, that there would be no breach of the duty which is annexed to the power until the death of the donee of the power. To apply that reasoning to this case appears to me to strain the true meaning of this instrument."

In *Lambert* v. *Thwaites* (1), which was again a case of a settlement—in that case, post-nuptial—certain freehold property was conveyed to trustees upon trust to pay the rents to W. and his wife during their lives, and after the decease of the survivor upon trust to sell and divide the proceeds amongst all and every the children of W., in such shares and proportions as he should by will appoint. There were seven children living at the date of the settlement, one of whom died before W., who died without exercising the appointment. It was held that the property was vested in all the children liable to be divested by the execution of the power; and the power not having been executed, the representatives of the deceased child were entitled to his share. Kindersley V.-C. says (2): "In order to determine this question it is necessary to bear in mind what has now become an elementary principle in the doctrine of powers, although at one time it was disputed, and indeed held the other way—I mean the principle that the

(1) L. R. 2 Eq. 151. (2) L. R. 2 Eq. 155.

existence of a power of appointment does not prevent the vesting of the property until, and in default of, execution of the power. The exercise of the power will divest the estate; but until the power is exercised, it remains vested in those who are to take in default of appointment. That is now perfectly well settled, and has been so ever since the well-known case of *Doe* v. *Martin* (1) in 1790. But where the instrument contains no express gift over in default of appointment, the difficulty is to determine who are to take in default of appointment. The general principle seems to be this: If the instrument itself gives the property to a class, but gives a power to A. to appoint in what shares and in what manner the members of that class shall take, the property vests, until the power is exercised, in all the members of the class, and they will all take in default of appointment; but if the instrument does not contain a gift of the property to any class, but only a power to A. to give it, as he may think fit, among the members of that class, those only can take in default of appointment who might have taken under an exercise of the power. In that case the Court implies an intention to give the property in default of appointment to those only to whom the donee of the power might give it." Therefore, in the present case, children who died under the age of twenty-one would not take.

In re White's Trusts (2), which was a case of a will, covers the present case so far as the use of the words "children or their issue" is concerned. There a testator, who died in 1832, bequeathed 2500*l.* to trustees upon trust for his son R. H. White for life, and to divide the capital among his children; and the will proceeded as follows: "But should my said son die childless, I confide in the said trustees for applying the said last-mentioned sum of 2500*l.* capital stock to the benefit of such other of my children, or their issue, as they may think fit, for the interest and good of my family." It appeared that the trustees never acted in the trust. They died before R. H. White. So there was no possibility of the trust to apply the sum to the benefit of the testator's children

(1) (1790) 4 T. R. 39. (2) John. 656.

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or their issue as they should think fit being executed. There was no gift in default of appointment. R. H. White died childless. The testator left three children, the son R. H. White and two daughters. Both daughters had children, and one of them grandchildren, living. The question was who was entitled to the 2500*l*. Wood V.-C. said (1): "It is settled, by *Brown* v. *Higgs* (2) and *Burrough* v. *Philcox* (3), that, where there is a power to appoint among certain objects, and no gift in default of appointment, the Court will imply a gift to the objects of the power equally. The first point argued was, that the benefit which the issue were to take under the power was only substitutionary in the event of their parents being dead; but *Penny* v. *Turner* (4) is conclusive on the point, and, indeed, was a stronger case than this, because there was room there for an argument on the fact that the discretion extended only to determining what the share of each should be; whereas, here, the selection of the objects, as well as the apportionment of the shares, is left to the trustees' discretion"—that is exactly the case of the wife here—"and there is consequently no opening for any such contention. *Penny* v. *Turner* (4), therefore, which would bind me if on all fours with this, is in reality much stronger, and I may add that I entirely adopt the reasoning in that case. The implied gift is equally to all the objects of the power. The next question is, at what time the class is to be ascertained. The latest period that can be suggested is the death of the tenant for life. This is clearly not a case where I can hold that the discretionary power extended to the representatives of the surviving trustee. Both trustees died, and the power had ceased before the death of the tenant for life. In a case where the donee of the power survives the tenant for life, there would be a possible ground for arguing that the class must be kept in suspense long enough to let in all who might be born while the power was in existence. But, here, the latest period that can be fixed is the death of the tenant for life. Then the question arises, whether children who

(1) John. 659.
(2) (1799) 4 Ves. 708.
(3) (1840) 5 My. & Cr. 73.
(4) (1848) 2 Ph. 493.

predeceased the tenant for life are entitled to share. The words of this will clearly point to a personal enjoyment by the objects of the power at the death of the tenant for life" —and so in the case before me—"there is, therefore, strong reason for holding on the tenor of this particular will, if not on general principle, that none of those who predeceased the tenant for life could share in the benefits of an appointment under this power. There might be a question how far this being an implied gift to all the objects of the power, ought to be considered as creating vested interests in them. This would apply forcibly to a case like *Penny* v. *Turner* (1), where the objects are named; but, here, the benefit is bestowed upon a class, and the question is, at what time that class ought to be ascertained. I think that the right period is the death of the tenant for life; and the fund must, therefore, be divided among such of the children and grandchildren as were living at the death of the tenant for life, in equal shares per capita." In the present case there does not exist any complication arising from the deaths of different persons at different times, the donee of the power and the tenant for life being one and the same person. It appears to me that those three authorities conclude the question.

But counsel for the legal personal representative of the wife cited *In re Weekes' Settlement.* (2) When that case is carefully looked at, it appears to me that, so far from it being inconsistent with the cases I have dealt with, it really supports them, but is distinguished from them upon a very obvious ground. The headnote begins: "Where there is a gift to A. for life with a power to A. to appoint among a class, but no gift to the class and no gift over in default of appointment, the Court is not bound, without more, to imply a gift to the class in default of the power being exercised. In order to imply a gift there must be a clear indication in the will that the testator intended the power to be regarded in the nature of a trust, so that the class or some of the class should take." The gift in question in that case was as follows: "I bequeath to my husband James Slade a life interest in all

(1) 2 Ph. 493. (2) [1897] 1 Ch. 289.

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property real or personal which may come to me in accordance with the will of my late father Richard Weekes and also in the house which I took under the will of my late cousin George Weekes and I give to him power to dispose of all such property by will amongst our children in accordance with the power granted to him as regards the other property which I have under my marriage settlements." The will contained no gift over in default of appointment. There were children, but the husband died without having exercised the power. It was held that there was no gift to the children by implication, because it was evident that the power conferred on the husband was a mere power and not one coupled with a trust; and consequently the heir at law of the testatrix was entitled. Romer J. says (1): "I come to the conclusion on the words of this will that the testatrix only intended to give a life interest and a power to her husband—certainly she has not said more than that. Am I then bound by the authorities to hold otherwise? I think I am not. The authorities do not show, in my opinion, that there is a hard and fast rule that a gift to A. for life with a power to A. to appoint among a class and nothing more must, if there is no gift over in the will, be held a gift by implication to the class in default of the power being exercised. In my opinion the cases show (though there may be found here and there certain remarks of a few learned judges which, if not interpreted by the facts of the particular case before them, might seem to have a more extended operation) that you must find in the will an indication that the testatrix did intend the class or some of the class to take—intended in fact that the power should be regarded in the nature of a trust—only a power of selection being given, as, for example, a gift to A. for life with a gift over to such of a class as A. shall appoint." I think it is a clear inference from that that, if the learned judge had had before him such words as I have to consider here, he would have found that there was a gift to the children by implication. Although doubt is thrown on *In re Weekes' Settlement* (2) in Farwell on Powers, 3rd ed., p. 530, where it is submitted that

(1) [1897] 1 Ch. 292. (2) [1897] 1 Ch. 289.

the decision is inconsistent with the authorities and cannot be supported, yet no doubt is thrown by Romer J. on the authorities applicable to the present case. *In re Weekes' Settlement* (1) is rather a case in support of those authorities than one inconsistent with them.

Subject to production of an affidavit that there were no grandchildren who predeceased Mrs. Llewellyn, I declare that, upon the true construction of the settlement and in the events which have happened, the funds subject to the trusts of the settlement are now divisible equally between such of the children of the marriage as attained twenty-one and the grandchildren living at her death.

Solicitor for the plaintiff: *Official Solicitor.*

Solicitor for the children and Mrs. Llewellyn's representative: *C. W. Berkeley.*

Solicitor for the grandchildren: *A. T. Plant.*

A. L.

In re DEUTSCHE BANK (LONDON AGENCY).

[1918. D. 918.]

Emergency Legislation — Priority of non-enemy Creditors in Winding Up of Enemy Business—Enemy Character—Hostile Occupation of Creditor's Country—Trading with the Enemy Amendment Act, 1916 (5 & 6 *Geo.* 5, *c.* 105), *s.* 1, *sub-s.* 3.

The Trading with the Enemy Amendment Act, 1916, s. 1, sub-s. 3, provides that, in the winding up of a business under the Act, assets available for discharging unsecured debts shall be applied in discharging debts due to creditors who are not enemies in priority to unsecured debts due to creditors who are enemies.

Germany was in effective military occupation of Brussels and the greater part of Belgium at the date of an order under s. 1, sub-s. 1, of the Act for winding up the business carried on in this country by a German bank, of which a Belgian bank carrying on business in Brussels was an unsecured creditor:—

Held, that the Belgian bank was a creditor who was not an enemy within the meaning of sub-s. 3.

THIS case (reported ante, p. 30) came on again for the decision of the question (which had been left over at the

(1) [1897] 1 Ch. 289.

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hearing) whether in the winding up of the business carried on in this country by the Deutsche Bank the Banque de Bruxelles, an unsecured creditor, was an enemy within the meaning of the Trading with the Enemy Amendment Act, 1916, s. 1, sub-s. 3, which gives priority of payment of unsecured debts to non-enemy over enemy creditors.

The Banque de Bruxelles was a société anonyme constituted according to the laws of Belgium. Its head office was in Brussels. It was controlled by Belgian and non-enemy shareholders. Its directors were Belgian subjects and one French subject. It carried on business in Brussels and had no branch offices anywhere until after the Armistice. (1) It established one at Cologne as a temporary measure in connection with the occupation of German territory by Allied troops. On July 15, 1918 (which was the date of the winding-up order, erroneously stated in the previous report as July 18), Brussels and the greater part of Belgium were in the effective military occupation of Germany. The bank was placed by the German authority under the control of a German government delegate, a control which apparently resulted in violent conflict between the delegate and the directors, but the bank continued to carry on its business.

Maugham K.C. and *Whinney* for the Controller. The question is whether on the true construction of sub-s. 3 of s. 1 of the Act of 1916 the Banque de Bruxelles was on July 15, 1918, an enemy.

Clauson K.C. and *J. Beaumont* for the Banque. The Banque is not an enemy creditor. It has never in fact or in law been an enemy. It has only had certain disabilities imposed upon it, because at one time parts of Belgium were in the occupation of the enemy. If it is an enemy within sub-s. 3, it must also be an enemy within sub-s. 1—a conclusion which would lead to strange results. So, if sub-s. 1 does not apply to it as an enemy, it is difficult to see why sub-s. 3 should.

Beginning with the earliest Act, the Trading with the

(1) The date of the Armistice was November 11, 1918.

Enemy Act, 1914 (September 18, 1914), is not material. The Trading with the Enemy Amendment Act, 1914 (November 27, 1914), in its preamble, defines "enemies" as "persons and bodies of persons resident or carrying on business in any country with which His Majesty is for the time being at war," i.e., provided such person or body of persons is treated as an enemy within a proclamation: see s. 14, sub-s. 2. That is quite consistent with a person or a body of persons being treated as an enemy in a proclamation who is not an enemy within the Act. The Trading with the Enemy Proclamation, No. 2 (September 9, 1914), clause 3, defines "enemy" as meaning "any person or body of persons of whatever nationality resident or carrying on business in the enemy country" but not including "persons of enemy nationality who are neither resident nor carrying on business in the enemy country. In the case of incorporated bodies, enemy character attaches only to those incorporated in an enemy country." The Trading with the Enemy (Occupied Territory) Proclamation (February 16, 1915), clause 1, provides that "the Proclamations for the time being in force relating to trading with the enemy shall apply to territory in hostile occupation as they apply to an enemy country." The Trading with the Enemy Amendment Act, 1915 (July 29, 1915), left the definition of "enemy" in the Trading with the Enemy Amendment Act, 1914, untouched: *Société Anonyme Belge* v. *Anglo-Belgian Agency*. (1) The proclamation relating to trading with the enemy, dated September 14, 1915, unquestionably made the Banque an enemy for the purposes of proclamations. The Trading with the Enemy (Extension of Powers) Act, 1915 (December 23, 1915), which is not one of the series of the Trading with the Enemy Acts, is the only statute where reference is made to trading with persons in territory in the occupation of the enemy. It is clear that "enemies" in sub-s. 3 of s. 1 of the Trading with the Enemy Amendment Act, 1916 (January 27, 1916), must be construed by the definition in the preamble of the Trading with the Enemy Amendment Act, 1914.

(1) [1915] 2 Ch. 409.

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R. H. Hodge for British creditors. The Banque is an enemy creditor. All the Trading with the Enemy Acts of 1914, 1915 and 1916 must be taken together. The original Act, the Trading with the Enemy Act, 1914, means, by the language employed in sub-s. 2 of s. 1, to include as an enemy every person who is an enemy within any proclamation for the time being in force.

[RUSSELL J. It is strange if the meaning of an Act of Parliament can be altered by a proclamation.]

Central India Mining Co. v. *Société Coloniale Anversoise.* (1) All through the Acts the proclamations are treated as involving the test of what is an "enemy."

[The Legal Proceedings against Enemies Act, 1915 (March 16, 1915), was mentioned.]

Donald Cohen (*F. K. Archer* with him) for German creditors. The Banque ranks equally with these creditors. The preamble of the Trading with the Enemy Amendment Act, 1914, does not apply to the Trading with the Enemy Amendment Act, 1916. The argument advanced on behalf of British creditors is invoked. The proclamations are part of the catena of Acts constituting a code.

Gavin Simonds for the Board of Trade. There is no difficulty in legislating by proclamation. The contention for the German creditors is sound. If the view of the Banque is right, the Legislature would have, in effect, by directing the Controller to pay, been directing him to do what was trading with the enemy.

Clauson K.C. in reply. If an artificial meaning is to be put on "enemy" the onus is on the other side to establish it. The Banque is not an enemy at common law, and could bring an action.

Cur. adv. vult.

July 13. RUSSELL J. I have already decided in this case (2) that the provision contained in sub-s. 3 of s. 1 of the Trading with the Enemy (Amendment) Act, 1916 (which I hereafter refer to as the Act of 1916), giving priority to

(1) [1920] 1 K. B. 753. (2) Ante, p. 30.

unsecured creditors who are not enemies, continues in force after the coming into force of the Treaty of Peace with Germany, and that the date at which the enemy or non-enemy character of creditors is to be determined is the date of the winding-up order. The question which I have now to decide is whether on that date, July 15, 1918, the Banque de Bruxelles (hereinafter called the Bank), admittedly a creditor, was or was not an enemy within the meaning of the sub-section. [His Lordship stated the facts set out above.] Notwithstanding the enemy occupation of the greater part of Belgium, the Bank was and remained a subject of an Allied Power, and was not an enemy at common law. It was resident in territory occupied against its will by enemy forces. Neither was the Bank an enemy within s. 1, sub-s. 3, of the Act of 1916, unless there is to be found some special definition of enemy applicable to the word in that sub-section which covers and includes a creditor so situated as was situated the Bank. So far there is, I think, no dispute between the parties. The Bank says there is no such definition to be found. Those who oppose its claim to priority say there is.

It is necessary, therefore, to consider the Act of 1916, and the Acts with which, by s. 16, it enacted that it shall be construed as one. These are three in number: (1.) the Trading with the Enemy Act, 1914; (2.) the Trading with the Enemy Amendment Act, 1914; and (3.) the Trading with the Enemy Amendment Act, 1915. These Acts I will refer to respectively as the Act of 1914, the Amendment Act of 1914 and the Act of 1915. The Act of 1914 contains in terms no definition of "enemy." It enacts by s. 1, sub-s. 1, penalties for the offence of trading with the enemy "within the meaning of this Act." These last six words refer to the offence, not to the person in relation to whom the offence is committed. Sect. 1, sub-s. 2, defines the offence: "For the purposes of this Act a person shall be deemed to have traded with the enemy if he has entered into any transaction or done any act which was, at the time of such transaction or act, prohibited by or under any proclamation issued by His

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Majesty dealing with trading with the enemy for the time being in force, or which at common law or by statute constitutes an offence of trading with the enemy." That is to say, the enactment defines the offence by reference to a "transaction" or "act" prohibited by proclamation, or constituting at common law or by statute an offence of trading with the enemy. What the statute leaves to be dealt with by proclamation is the prohibition of a "transaction" or "act"; not the definition of an enemy.

The Amendment Act of 1914 in its preamble does define enemies as "persons and bodies of persons resident or carrying on business in any country with which His Majesty is for the time being at war." This would not on July 15, 1918, include the Bank. Belgium was not a country with which His Majesty was at war, although the greater part of its territory was in the occupation of a Power with whom His Majesty was at war. I note, in passing, s. 3 of that Act, which casts a duty on trustees for enemies to communicate certain information to the custodian. Sect. 14 further limits the definition of enemies by providing that no person or body of persons shall for the purposes of the Act be treated as an enemy who would not be so treated for the purpose of any proclamation issued by His Majesty dealing with trading with the enemy for the time being in force. To be an enemy within this Act you must comply with the preamble definition and also be a person or body of persons who would be treated as an enemy for the purposes of a proclamation. But a person or body of persons might be so treated, and yet not be an enemy within the Amendment Act of 1914. Thus there might be a proclamation treating a transaction with a person resident in Allied territory occupied by the enemy as constituting the offence of trading with the enemy, and yet such a person would not be an enemy within the Amendment Act of 1914. Sects. 6, 7 and 8 of the Amendment Act of 1914 deal with certain specific matters relating to certain property of enemies. I need not refer to them in detail. They are only of importance because, with regard to those sections, the definition of enemy is extended by the Act of 1915.

The Act of 1915 contains no fresh definition of enemies, except in regard to those three sections. Sect. 3 of the Act of 1915 provides that ss. 6, 7 and 8 of the Amendment Act of 1914 shall apply as if the expression " enemy " where used in those sections included any person or body of persons who is an enemy or treated as an enemy under any proclamation relating to trading with the enemy for the time being in force.

Let me at this point refer to the relevant Trading with the Enemy Proclamations in force at the date of the Act of 1915. The Trading with the Enemy Proclamation No. 2, dated September 9, 1914, defined enemy for the purposes thereof, and declared that in the cases of incorporated bodies enemy character attached only to those incorporated in an enemy country. The Trading with the Enemy (Occupied Territory) Proclamation, 1915, dated February 16, 1915, declared that the proclamations for the time being in force relating to trading with the enemy should apply to territory in hostile occupation as they apply to an enemy country.

The statutes and proclamations relating to trading with the enemy being such as I have stated, *Société Anonyme Belge* v. *Anglo-Belgian Agency* (1) came for decision on appeal from Younger J. The plaintiff was a company incorporated under the laws of Belgium with its registered office at Antwerp. A large portion of Belgium (including Antwerp) was in the effective military occupation of Germany. The defendants, who acted as bankers for the plaintiff, held moneys on the plaintiff's behalf; they refused to pay a cheque drawn on them by the plaintiff, and threatened to make a return to the custodian of such moneys. The plaintiff sued for a declaration that it was not an enemy within the meaning of the Trading with the Enemy Acts and the proclamations, and for an injunction to restrain the defendants from making any return to the custodian. Younger J. held (1.) that the plaintiff must, for the purpose of the proclamation of September 9, 1914, be treated as an enemy within the proclamation of February 16, 1915, and therefore could not claim payment of the cheque, and (2.) that the plaintiff

(1) [1915] 2 Ch. 409.

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was not an enemy within the meaning of the Amendment Act of 1914 or the Act of 1915, and granted an injunction. The Court of Appeal took a different view on the first point, and made a declaration in the following terms: "Declare that for the purposes of the Acts and Proclamations relating to trading with the enemy, and each of them, the plaintiff company is not to be treated as an enemy, and that no notification or return ought to be made under s. 3 of the Trading with the Enemy Amendment Act, 1914, or s. 2 of the Trading with the Enemy Amendment Act, 1915." That is a decision which entitles the Bank here to say that at all events in July, 1915, it was not an enemy within either the Amendment Act of 1914 or the Act of 1915. In consequence of that decision a proclamation was promulgated on September 14, 1915, by which it was declared as follows: "Whereas doubts have arisen as respects the position under the Proclamations for the time being in force relating to Trading with the Enemy of incorporated companies or bodies of persons which, though not incorporated in any enemy country or in territory in hostile occupation, carry on business in any such country or territory: And whereas it is expedient that the position of those companies or bodies for the purposes of those Proclamations should be defined: Now therefore, We have thought fit, by and with the advice of Our Privy Council, to issue this Our Royal Proclamation declaring, and it is hereby declared, as follows:—For the purposes of the Proclamations for the time being in force relating to Trading with the Enemy, the expression 'enemy,' notwithstanding anything in the said Proclamations, is hereby declared to include, and to have included, any incorporated company or body of persons (wherever incorporated) carrying on business in an enemy country or in any territory for the time being in hostile occupation." That proclamation no doubt made the Bank an enemy for the purposes of the proclamations relating to trading with the enemy, and probably (by virtue of s. 3 of the Act of 1915) made it also an enemy for the purposes of ss. 6, 7 and 8 of the Amendment Act of 1914.

The Act of 1916 defines "enemy subject" as a subject of a State for the time being at war with His Majesty. It nowhere defines enemy. It deals with a variety of matters. It does not deal with the offence of trading with the enemy as such, except to the extent of creating a new misdemeanour punishable in like manner as that offence. Sect. 1 provides (inter alia) for winding up businesses carried on in the United Kingdom for the benefit of or under the control of enemy subjects, and in that winding up priority is given to unsecured debts due to creditors who are not enemies over unsecured debts due to creditors who are enemies. The Act is to be construed as one with its three predecessors, so that the definitions to be found in those Acts are to be, so far as applicable, used in construing the Act of 1916. The extended definition of enemies contained in s. 3 of the Act of 1915 is clearly inapplicable. The only other definition of enemy which I can find in any of the Acts is the definition in the preamble to the Amendment Act of 1914, and that would not include the Bank. Judged by that definition the Bank was not on July 15, 1918, an enemy.

Two contentions were raised adverse to this view. First, it was said that you must read and construe the four Acts as one. I agree. If you do this, it is said, you can spell out of s. 1, sub-ss. 1 and 2, of the Act of 1914 a definition of enemy with reference to whoever is defined as an enemy in any proclamation relating to trading with the enemy, or is treated as such for the purpose of such proclamation; and that accordingly any one who by such proclamation is defined to be an enemy or is declared to be treated as an enemy is an enemy for the purpose of each and all these Acts, including the Act of 1916 and s. 1, sub-s. 3, thereof. The last link in the chain of argument is the proclamation of September 14, 1915, which made the Bank an enemy for the purpose of the proclamations, and, therefore, it is said the Bank was, on July 15, 1918, an enemy within s. 1, sub-s. 3, of the Act of 1916. I cannot accede to this view. The first link in the chain fails. There is no definition of enemy in the Act of 1914 by reference to proclamations or otherwise. All

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that s. 1 of that Act purports to do is to create a statutory offence (making it a misdemeanour punishable as there mentioned) and to define the statutory offence as the entering into any transaction or doing any act which either (1.) is prohibited by proclamation, or (2.) constitutes an offence of trading with the enemy at common law, or (3.) constitutes an offence of trading with the enemy by statute. Sect. 1, sub-s. 3, of the Act of 1916 gives a statutory priority to non-enemies. It creates a privileged class of creditors. This portion of the enactment has no relation or reference at all to the offence of trading with the enemy. It would require very clear words to reach the conclusion that the enjoyment of this statutory priority may depend upon a proclamation, and upon a proclamation promulgated alio intuitu. I can find no words suggesting this conclusion, clear or otherwise.

Secondly, it is said that to hold that the Bank was not on July 15, 1918, an enemy within the meaning of s. 1, sub-s. 3, of the Act of 1916 involves the result that the Controller would, if the assets were ripe for distribution while Germany was still in occupation of the greater part of Belgium, have been bound to pay the Bank at once, and so, by reason of the proclamations, have been guilty of the offence of trading with the enemy. I do not agree. The Controller is not bound to pay any one who could not give a good discharge, nor would he, in my opinion, have been bound to make any payment, the making of which would have been a misdemeanour. As the concluding sentence of the sub-section shows, he would comply with its provisions by setting apart the amount of the debt or dividend and thus providing for the discharge of the liability.

In my opinion the Bank ought to be included among the class of creditors who are not enemies, and I direct the Controller to include them in such class accordingly.

Solicitors: *Peter Thomas & Clark; Budd, Johnson, Jecks & Colclough; Gush, Phillips, Walters & Williams; J. I. Jonas; Solicitor to Board of Trade.*

A. L.

WALLIS *v.* GRIFFITHS.

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1921
June 15.

[1921. W. 455.]

Practice — Mortgagor and Mortgagee — Delivery of Possession — Originating Summons — Jurisdiction — Rules of the Supreme Court, 1883, *Order* LV., *r.* 5A.

A legal mortgagee is not entitled, upon an originating summons under Order LV., r. 5A, to an order for delivery of possession of the mortgaged premises without any claim for sale or foreclosure, and the Court has no jurisdiction to make such an order.

ADJOURNED SUMMONS.

The plaintiff, Edmund Lamb Wallis, of Hereford, solicitor, was the mortgagee of a freehold dwelling house and land in the county of Hereford, and the defendant, Kathleen Griffiths, was the mortgagor of the said hereditaments, her husband, David Allen Griffiths, being also a defendant.

In 1914 the defendant, K. Griffiths, bought the above-stated freehold property in her own name, and it was conveyed to her alone.

By a mortgage dated September 22, 1914, made between the defendant, Kathleen Griffiths, her husband, David Allen Griffiths, and John Goodwin, after reciting that K. Griffiths was seised in fee simple of the freehold hereditaments hereinafter described and that J. Goodwin had agreed at the request of the defendants to advance to the defendant K. Griffiths 600*l.*, the defendants covenanted to repay the sum advanced on March 22 then next, and the defendant K. Griffiths as beneficial owner conveyed the dwelling house near Crossways in the parish of Peterchurch in the county of Hereford with the coach-house stables etc. and adjoining parcels of land containing about seven acres unto and to the use of John Goodwin in fee subject to redemption on payment by either of the defendants of 600*l.* By a mortgage of November 12, 1919, the defendant K. Griffiths conveyed the same premises to the plaintiff to secure 200*l.* subject to the prior mortgage of September 22, 1914; and by a deed of transfer dated May 26, 1920, J. Goodwin and K. Griffiths

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transferred to the plaintiff the principal sum of 600*l.* owing on the mortgage of September 22, 1914.

In November, 1920, K. Griffiths was desirous of selling the property comprised in these mortgages, and on November 10, 1920, an offer was received of 2000*l.* for the property from one Arthur E. Goodwin, but refused by the defendant, who insisted upon her solicitors putting up the property to auction. This was done, but it did not fetch the reserve price of 1800*l.* and was not sold, the highest bid being 1725*l.* On December 3, 1920, A. E. Goodwin, through the plaintiff's solicitors, purchased the property for 1800*l.*, such purchase to be completed with vacant possession on March 25, 1921. The defendants objected to the sale at this price, alleging that 2070*l.* was the value of the property, and the defendant D. A. Griffiths in particular threatened to refuse to give up vacant possession to the purchaser.

On February 1, 1921, the plaintiff took out an originating summons against K. Griffiths and David Allen Griffiths, asking for an order that the defendants do deliver up possession of the property in question to the plaintiff. The application was made under Order LV., r. 5A, which enacts that "any mortgagee or mortgagor, whether legal or equitable, or any person entitled to or having property subject to a legal or equitable charge, or any person having the right to foreclose or redeem any mortgage, whether legal or equitable, may take out as of course an originating summons . . . . for such relief of the nature or kind following as may by the summons be specified, and as the circumstances of the case may require, that is to say,—Sale, foreclosure, delivery of possession by the mortgagor. . . . ."

R. L. Ramsbotham for the plaintiff. Two questions arise: (1.) whether the Court has jurisdiction to order the mortgagor to deliver up possession to the mortgagee on an originating summons; and (2.) if there is jurisdiction whether the Court should exercise it. Rule 5A of Order LV. is quite clear, and gives the mortgagee a cheaper and more expeditious way of getting possession: Annual Practice, 1921, pp. 996, 997.

The order made by Stirling J. in *Hill* v. *Stephens* (1) in chambers on June 27, 1887, was under Order XVIII., r. 2, relating to joinder of different causes of action, and does not touch this point. It is purely a question of procedure. There are two cases in Ireland where a similar order to that asked for here has been made upon an originating summons. The one is *Bank of Ireland* v. *Slattery* (2) before the Master of the Rolls in Ireland, where the order was made under Order LV., r. 7, of the Irish rules, which is practically identical except for the omission of the word "foreclosure" before the words "delivery of possession to the mortgagor." The other is *Bunyan* v. *Bunyan* (3) before Mr. Justice Barton. The order would not be made as a matter of course but where there are special grounds for making it: *Birch* v. *Wright.* (4) There are such grounds here.

Roger Turnbull for the defendants. There are two fatal objections to these proceedings. The first is that an order for delivery up of possession alone has never been granted under Order LV., r. 5A; delivery of possession is merely ancillary to foreclosure. The second is that the application is wholly misconceived in that the summons asked for delivery of possession against the husband, who is not in legal possession of the property. On the first point the decision of Stirling J. in *Hill* v. *Stephens* (1) on the effect of Order LV., r. 5A, has never been questioned or contradicted, and has been followed in text-books such as Fisher on Mortgages, 6th ed., p. 840; Coote on Mortgages, 8th ed., p. 1083. Drastic results would follow if proceedings of this character for the recovery of land could be taken on originating summons. The two cases in Ireland are not binding on this Court, and the rule there (Order LV., r. 7) was not identical in terms with the English rule. On the second point, if the Court had jurisdiction to make the order for possession it would be useless as against the husband. Lastly, such an order could only be made under special circumstances even if the Irish cases were followed, and there are no such circumstances here. There is no

(1) Cause Book, 1887, H. 2063.
(2) [1911] 1 I. R. 33.
(3) [1916] 1 I. R. 70.
(4) (1786) 1 T. R. 378.

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hardship in requiring the plaintiff to adopt the normal procedure and to take out a summons for foreclosure.

R. L. Ramsbotham in reply.

EVE J. This summons raises a point of procedure, is the applicant as legal mortgagee entitled to an order for delivery of possession on an originating summons issued under Order LV., r. 5A, claiming possession of the mortgaged premises and no other relief ?

By the rule a mortgagee in the position of the plaintiff may take out as of course an originating summons for such relief as may be thereby specified and as the circumstances of the case may require, that is to say, "sale, foreclosure, delivery of possession by the mortgagor." . . . . Does that mean that he may issue a summons for possession only and without including any claim for sale or foreclosure ? That is what the applicant in this case has done, and he insists on his right to an order. Have I any jurisdiction to make it ? The point came before Stirling J. in 1887 in *Hill* v. *Stephens* (1), and the conclusion at which he arrived was that the originating summons under this rule is only in substitution for the action previously necessary, and that the rule ought not to be construed into giving any remedy which could not be got under the old practice. Accordingly in his view if delivery of possession only is sought an action for recovery of land is the proper procedure. This construction of the rule appears to have been adopted ever since in this country and is so stated by text-book writers and in the practice manuals. But in Ireland, where a corresponding rule exists substantially in the same terms, there are two reported cases wherein a different construction has been adopted and a mortgagee has been held entitled to an order for delivery of possession on a summons restricted, as the one before me is, to a claim for possession. The word "foreclosure" does not occur in the Irish rule, but I cannot say that its omission makes any material distinction between the two rules on the point I am considering, and the result

(1) Cause Book, 1887, H. 2063.

is that I have on the one side a ruling on a question of procedure by one of the most experienced judges in these matters in this country, accepted and acted upon for over thirty years, and on the other decisions in Ireland which are not binding upon me, and which after all were given on a rule differing slightly but not, in my opinion, materially from the rule with which I have to deal. In these circumstances I think it is my duty on a matter of procedure and practice to follow the course which has been adopted here, and accordingly I hold that I have no jurisdiction to make the order asked by this summons, and I dismiss it with costs.

Solicitors: *Rider, Heaton, Meredith and Mills, for E. L. Wallis & Son, Hereford; Calder Woods and Pethick, for Lambe, Carless & Capel, Hereford.*

G. M.

ATTORNEY-GENERAL *v.* COTTON POWDER COMPANY, LIMITED.

[1920. A. 1206.]

War—Defence of the Realm—Indemnity—Public Highway—Obstruction—Action to restrain—Stay—Costs—Jurisdiction—Indemnity Act, 1920 (10 *&* 11 *Geo.* 5, *c.* 48), *s.* 1, *sub-ss.* 1, 3—*Practice.*

On July 27, 1920, the plaintiffs commenced an action to restrain the defendants from committing a nuisance and obstruction to a public highway by reason of the erection of a jetty for use in the river Swale. The defendants had erected the work complained of under the authority of the Admiralty and in good faith and for the defence of the realm, and had obtained a certificate from two Commissioners of the Admiralty which was sufficient evidence, under sub-s. 3 of s. 1 of the Indemnity Act, 1920, of the authority for executing the work. The action came within sub-s. 1 of s. 1 of the Act, which was passed on August 16, 1920, and enacted that any such proceeding should be discharged and made void. Upon a summons by the defendants to stay the proceedings, and for their costs of action against the plaintiffs:—

Held, that sub-s. 1 of s. 1 of the Act contemplated that some order discharging and making void the proceedings would be necessary, and the Court had jurisdiction to make an order awarding the defendants their costs of action down to and including the order.

ADJOURNED SUMMONS.

The action was by the Faversham Rural District Council, suing by the Attorney-General. The plaintiff council were

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the Highway authority for the Rural District of Faversham, Kent. In their district was a public highway connected with a ferry across the tidal river Swale. When the tide ran out there was a Hard, called the Harty Ferry Hard, which was used as a public highway across the mud leading to a ferry boat. On the side of the river the defendants had extensive plant for the manufacture of gunpowder and cordite for the Admiralty. The action was for an injunction to restrain the defendants from committing an alleged nuisance and obstruction caused to this public highway by the deposit of mud thereon, and for damages.

It was commenced on July 27, 1920, and by the statement of claim delivered on October 22 it was alleged that by the construction in 1916 and the subsequent maintenance of a wharf or jetty in the river Swale the defendants had caused and were still causing an accumulation of mud in the said highway. By the defence delivered on December 7 the defendants, asserting that the execution and maintenance of the works complained of was and had been done in good faith, and under the authority of persons holding office, or in the service of the Crown at the Admiralty acting in the execution of their duty, and for the defence of the realm, or the public safety, or otherwise in the public interest, pleaded that the action was contrary to the Indemnity Act, 1920, and ought to be discharged and made void thereunder.

On December 23 the defendants obtained the certificate from two of the Commissioners for executing the office of Lord High Admiral of the United Kingdom that the works and wharf or jetty complained of in the statement of claim as having been executed, constructed, and maintained by the defendants, were so executed, constructed, and maintained for the defence of the realm and the public safety, and otherwise in the public interest under the authority of the Commissioners for the time being for executing the said office.

By sub-s. 3 of s. 1 of the Indemnity Act, 1920, this certificate was sufficient evidence of the authority and of the works having been executed, constructed, and maintained

thereunder, and the execution, construction, and maintenance were to be deemed to have been done in good faith unless the contrary was proved.

In these circumstances the action came within sub-s. 1 of s. 1 of the Indemnity Act, 1920, and should be stayed, the plaintiffs being left to the substituted remedies provided by the Act. That sub-section in question provided that no action whatsoever should be instituted in any Court of law in respect of any Act within or without His Majesty's dominions during the war before the passing of this Act "if done in good faith, and done or purported to be done in the execution of his duty or for the defence of the realm or the public safety, or otherwise in the public interest, by a person holding office under or employed in the service of the Crown," and that if any such proceeding had been instituted, whether before or after the passing of the Act, it should "be discharged and made void, subject in the case of a proceeding instituted before July 20, 1920, to such order as to costs as the Court or a judge may think fit to make." This Indemnity Act was passed on August 16, 1920.

The defendant company issued a summons to stay the proceedings against them, and asked for their costs of the action and of the summons, against the plaintiffs.

Wilfrid Hunt for the defendants. The action must be discharged and made void under the Act, and the defendants are entitled to their costs.

E. J. Naldrett for the plaintiffs. There is no more reason for suggesting that the defendants should have their costs than that the plaintiffs should have theirs. Their action was brought before the passing of the Indemnity Act, 1920. That Act put a stop to the proceedings, and no further application was necessary.

Sub-s. 1 of s. 1 extends to proceedings instituted whether before or after the passing of the Act, and not only to those instituted after July 20, 1920, and the Legislature could not have intended to inflict on either side the penalty of costs. The express proviso as to costs at the end of the sub-section

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limits the cases in which any order as to costs may be made to proceedings commenced before July 20, 1920. The defendants are not entitled to their costs, and the Court has no jurisdiction to give them.

Wilfrid Hunt in reply.

Cur. adv. vult.

June 21. EVE J. [after stating the facts continued :] The question is whether, on the summons to stay which is now before me I have jurisdiction to award the defendants the costs of the action and of this summons. I think I have. Sub-s. 1 of s. 1 of the Act is in these words. [His Lordship read the sub-section, and continued :] It has been argued on behalf of the plaintiffs that inasmuch as the sub-section extends to proceedings instituted at any time before the passing of the Act and not solely to proceedings instituted after July 20, 1920, the Legislature, in imposing a statutory prohibition on their further prosecution, cannot be presumed to have intended to inflict on either side the penalty of costs, and the express proviso as to costs with which the sub-section concludes, and under which it would obviously be open to the Court to award costs to the plaintiffs in a proceeding instituted before July 20, is relied upon as limiting the cases in which any order as to costs can be made.

I do not think this is the right construction of the sub-section. It contemplates, I think, that some order "discharging and making void" the proceedings will be necessary, and in the ordinary course such an order—that is to say, an order to stay on the ground that the plaintiff has no subsisting cause of action—would include directions for the taxation and payment of the defendants' costs. Then there is the proviso that in the case of a proceeding instituted before July 20 the Court may, if it sees fit so to do, depart from the ordinary practice and may give the plaintiff his costs notwithstanding that the action can no longer be maintained.

The present case does not fall within the proviso, and the defendants are, in my opinion, entitled to their costs of the action down to and including this order.

Nothing I have said will prejudice any claim the plaintiffs may put forward to recover these costs as part of the compensation which may ultimately be adjudged payable to them.

Solicitors: *Kingsford, Dorman & Co., for Guy Tassell, Faversham; White & Leonard.*

G. M.

In re EVANS' WILL TRUSTS.

PICKERING *v.* EVANS.

[1921. E. 473.]

Will—Residuary Gift—Successive Interests—Copyright in Books—Royalties—Capital or Income—Tenant for Life and Remainderman—Contrary Intention—Rule in Howe v. *Lord Dartmouth* (1802) 7 *Ves.* 137*a*.

A testator, who was possessed of the copyright in certain books of which his aunt was the authoress, bequeathed all his real and personal estate to trustees upon trust to pay the income to his wife, and after her death or second marriage he devised and bequeathed the whole of such real and personal estate to his trustees upon trust to divide the same into three equal parts and to pay the income of one third to each of two sisters and a brother for life, with remainder in each case to the children of the life tenant. Some of these books were being published under agreements with publishers securing royalties to the testator as owner of the copyright. The copyrights in other stories had been previously transferred by the authoress under agreements to publishers who were to publish the story in book form, and after deducting from the income all expenses relating to the production and sale the profits remaining were to be equally divided between the authoress and the publishers:—

Held, that the mere trust, on the determination of the limited interest, to divide the residuary estate was not in itself a sufficient manifestation of an intention to exclude the application of the rule in *Howe* v. *Lord Dartmouth* (1802) 7 Ves. 137*a*, and in accordance with that rule the interest of the testator in the copyrights and his agreements relating thereto must be valued as at the expiration of one year from the date of his death, and the tenant for life would, as from the death, be entitled to receive interest at 4*l*. per cent. on such value.

Held, further, that the testator's interest in the copyrights under the prior agreements as to which there was a joint adventure or partnership

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came within the third class of property dealt with in *Meyer* v. *Simonsen* (1852) 5 De G. & Sm. 723, 726, and must be treated in the same manner, and the surplus income from all the contracts also invested and the income therefrom paid to the tenant for life.

The trustees would be authorized to retain the copyrights unsold until further order.

ADJOURNED SUMMONS.

By his will dated May 11, 1914, J. L. Davis Evans appointed the plaintiffs Walter Pickering and David Rudolf Evans his executors and trustees, and bequeathed all his real and personal property (other than certain property therein mentioned) to his trustees upon trust to pay the income to his wife, the defendant Jeannette Mary Evans, until her death or second marriage, and after her death or second marriage he appointed, devised, and bequeathed the whole of "such" real and personal estate to his trustees upon trust to divide the same into three equal shares and to pay the income of one equal third share to each of his two sisters and a brother for life, to whom he gave a power of appointment to their issue respectively, with an ultimate remainder to his niece Margaret Sarita Evans, who was the last defendant and an infant under ten. The other defendants were beneficiaries under the will entitled in remainder.

The testator died on July 25, 1914. In his lifetime he was entitled to the copyright in certain novels, such copyright having been bequeathed to him by the will, dated June 19, 1906, of his aunt Anne Adeliza Puddicombe, the authoress of twelve novels written under the pseudonym of "Allen Raine." Mrs. Puddicombe died on June 21, 1908; and in her lifetime had dealt with the copyright in some of these novels under nine agreements with publishers all in substantially the same form. One of such agreements "A" was entered into on July 9, 1897, by Mrs. Puddicombe with her publishers, Messrs. Hutchinson & Co., of Paternoster Row, and by para. 1 of that agreement the authoress transferred to the publishers the copyright in a story entitled "Mifanwy," the manuscript of which had been delivered to the publishers. By para. 2 the publishers were to publish the story in book form and to use their best endeavours to

make it successful. Para. 3 provided that after deducting from the income all expenses relating to the production and sale of the story, including 5 per cent. on the income in lieu of allowances therein mentioned, the profits remaining were to be equally divided between the authoress and the publishers. By subsequent paragraphs it was provided that should the sales be insufficient to repay expenses the authoress was not to be liable to make good the loss; that the publishers should make up accounts and pay to the authoress what was found due to her; and the authoress undertook to keep the publishers indemnified against any claim by reason of the story containing any libellous matter.

Two other agreements "B" and "C" were in evidence and contained identical provisions relating to two other stories of the authoress.

David Rudolf Evans, who was also one of the executors of the will of Mrs. Puddicombe, after her death at the request of the testator entered into another agreement ("D") dated November 28, 1908, whereby he and the beneficial owner agreed to grant to the publishers the sole and exclusive right of printing, publishing and selling in book form another of the said novels called "Where Billows Roll." Under this agreement the publishers were to publish this novel at their own expense at the price of 6*s.* and to pay to the executor a royalty of 20 per cent. of the published price on all copies up to 5000, and 25 per cent. on all copies above 5000; and among other provisions the publishers were on the day of the receipt of this signed agreement to pay to the executor and beneficiary 400*l.* in advance and on account of all royalties and other monies to become due under the agreement. Three further agreements dealing with the film rights of three novels were entered into by the trustees of the testator's will in consideration of royalties reserved, and they contemplated entering into other agreements if they had power so to do.

Since the testator's death the plaintiffs as such executors and trustees had received under the various agreements 2152*l.* 17*s.* 10*d.* in respect of royalties, and they considered that this sum ought to be treated as capital of the testator's

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estate, and invested, and the income of the investments was paid to the defendant Jeannette Mary Evans as tenant for life. The trustees desired to retain the copyrights unconverted as part of the testator's estate, as such copyrights had many years to run and their value on a sale would be problematical and uncertain. The value which the publishers placed upon them shortly after the testator's death was only 295*l.* 5*s.* The trustees desired to ascertain the rights of the tenant for life and the beneficiaries under the will and accordingly issued a summons asking (inter alia) (1.) whether the royalties or other moneys received by the plaintiffs under the agreements relating to copyrights belonging to the testator should be treated for the purposes of the trusts of the will wholly or partially as capital or wholly or partially as income; (3.) whether it was the duty of the trustees to sell the said copyrights and royalties and the benefits of the agreements relating thereto and invest the proceeds; (4.) whether, if so, the trustees might be authorized to retain the copyrights and the benefits of the agreements unsold; (5.) that the rights in the royalties or other moneys received during such retention might be declared as between tenant for life and remainderman.

Roope Reeve for the trustees of the will.

C. W. Turner for the tenant for life. I claim the whole income and profits for the tenant for life to be enjoyed in specie. The rule in *Howe* v. *Lord Dartmouth* (1) does not apply, as there are sufficient indications of a contrary intention to take it out of that rule. Two of these indications are (1.) that there is an entirely new gift in the will after the gift of the life interest, and (2.) there is a trust to "divide" the whole residuary estate into three parts. These are sufficient to indicate an intention to give specific enjoyment of the property.

[EVE J. referred to *In re Hollebone* (2) and *Beavan* v. *Beavan*. (3)]

(1) 7 Ves. 137*a*. (2) [1919] 2 Ch. 93.
(3) (1869) 24 Ch. D. 649*n*.

The principle adopted in *In re Hollebone* (1) applies to those copyrights which had already been sold and transferred by the authoress to her publishers. As to the other agreements the case comes within the exception to the rule in *Howe* v. *Lord Dartmouth* (2), the words of division being sufficient. *Collins* v. *Collins* (3), where there was a similar direction to divide. In *Pickering* v. *Pickering* (4) there was an indication of intention that the tenant for life should enjoy the property in specie. So also in *Pickup* v. *Atkinson*. (5) But if the rule in *Howe* v. *Lord Dartmouth* (2) is held to apply the question will arise as to what interest is payable to the tenant for life, and at what date the valuation should be made, whether at the death of the testator or at a year after his death.

G. Ansley for the remaindermen. The present case is governed by *Meyer* v. *Simonsen* (6), which is on all fours with it—on the assumption that the rule in *Howe* v. *Lord Dartmouth* (2) applies. Parker V.-C. in *Meyer* v. *Simonsen* (6) said there were three distinct classes of cases, and the present case comes within the third class there mentioned. These are wasting assets under the various agreements, and the value of these copyrights should be ascertained as at one year after the testator's death, and interest at 4 per cent. given to the tenant for life, and the rest treated as capital: Williams on Executors, 11th ed., vol. ii., p. 1119; *In re Llewellyn's Trust* (7); *In re Beech* (8); *Brown* v. *Gellatly* (9); *Wentworth* v. *Wentworth*. (10) There is no sufficient indication of a contrary intention here. *Collins* v. *Collins* (3) and *Pickup* v. *Atkinson* (5) are instances of a contrary intention being implied from the use of the word "divide," but in the present case the words are not nearly so strong as in those cases. Nor does the presence of the word "such" in the gift of the residuary real and personal estate in the testator's will indicate an intention to make this devise specific, and

(1) [1919] 2 Ch. 93.
(2) 7 Ves. 137*a*.
(3) (1833) 2 My. & K. 703.
(4) (1839) 4 My. & Cr. 289.
(5) (1846) 4 Hare, 624.
(6) 5 De G. & Sm. 723.
(7) (1861) 29 Beav. 171.
(8) [1920] 1 Ch. 40.
(9) (1867) L. R. 2 Ch. 751.
(10) [1900] A. C. 163.

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take it out of the rule. On behalf of the infant remainderman and other defendants I agree to a temporary postponement of the conversion of this property, but it would be disastrous to postpone it indefinitely.

The other agreements entered into in the lifetime of Mrs. Puddicombe also come within the principle of the rule in *Meyer* v. *Simonsen* (1) as opposed to that in *Beavan* v. *Beavan*. (2) The distinction between them is that according to *Beavan* v. *Beavan* (2) there must be deferred capital payments, but in *Meyer* v. *Simonsen* (1) there must be annual payments due to the testator. If, on the true construction of these agreements, (A), (B) and (C), it is not found that these sums are deferred capital then the rule in *Meyer* v. *Simonsen* (1) applies. They are not really contracts for sale.

The agreement (A) of July 9, 1897, was a joint commercial adventure; the terms of the agreement (para. 3) are inconsistent with an out-and-out sale, and there is an obligation on the publishers to publish. It is income which is to be received, not capital, and it is income liable to income tax. It does not come within *In re Hollebone* (3) at all.

C. W. Turner in reply.

EVE J. At the date of his death, on July 25, 1914, the testator was possessed of the copyright in certain literary works of which his aunt, Mrs. Puddicombe, was the authoress. Some of these works were being published under agreements with publishers, securing royalties to the testator as owner of the copyright. By his will he gave and bequeathed all his real and personal estate, other than certain specified property, to trustees upon trust to pay the income thereof to his wife until her decease or second marriage, and from and after her decease or second marriage he appointed, devised, and bequeathed the whole of his real and personal estate unto his trustees upon trust to divide the same into three equal shares, and to pay the income of one-third to a sister, of a second third to another sister, and of the remaining third

(1) 5 De G. & Sm. 723. (2) 24 Ch. D. 649*n*.
(3) [1919] 2 Ch. 93.

to a brother, with remainder in each case to the children of the life tenant as therein mentioned. The question is whether the tenant for life is entitled to receive and retain for her own use the whole of the royalties payable by the publishers under the agreements I have mentioned, and the answer involves the inquiry whether the rule in *Howe* v. *Lord Dartmouth* (1) is to be applied, or whether I can find in the will any sufficient indication of an intention that the rule shall not be applied. According to James L.J. in *Macdonald* v. *Irvine* (2) "it is quite clear that the rule must be applied unless, upon the fair construction of the will, you find a sufficient indication of intention that it is not to be applied; the burden in every case being upon the person who says the rule of the Court of Chancery ought not to be applied in the particular case." In *Pickering* v. *Pickering* (3) Lord Cottenham in explaining the rule says this: "Very nice distinctions have been taken, and must have been taken, in determining whether the tenant for life is to have the income of the property in the state in which it is at the date of the testator's death, or the income of the produce of the conversion of the property. The principle upon which all the cases on the subject turn is clear enough, although its application is not always very easy. All that *Howe* v. *Lord Dartmouth* (1) decided—and that was not the first decision to the same effect—is that, where the residue or bulk of the property is left en masse, and it is given to several persons in succession as tenants for life and remaindermen, it is the duty of the Court to carry into effect the apparent intention of the testator. How is the apparent intention to be ascertained, if the testator has given no particular directions? If, although he has given no directions at all, yet he has carved out parts of the property to be enjoyed in strict settlement by certain persons, it is evident that the property must be put in such a state as will allow of its being so enjoyed. That cannot be, unless it is taken out of a temporary fund and put into a permanent

(1) 7 Ves. 137*a*. (2) (1878) 8 Ch. D. 101, 124.
(3) 4 My. & Cr. 289, 298.

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fund. But that is merely an inference from the mode in which the property is to be enjoyed, if no direction is given as to how the property is to be managed. It is equally clear that, if a person gives certain property specifically to one person for life, with remainder over afterwards, then, although there is a danger that one object of his bounty will be defeated by the tenancy for life lasting as long as the property endures, yet there is a manifestation of intention which the Court cannot overlook." In this case it cannot be suggested that I have the state of things contemplated in the concluding sentence I have quoted from Lord Cottenham's judgment. What I have to deal with is a gift of the residuary real and personal property en masse. Prima facie therefore the case is one to which the rule ought to be applied. Does the fact that the testator after the determinable life interest given to his widow appoints, devises and bequeaths the whole of his residuary real and personal estate to trustees upon trust to divide the same into three parts manifest an intention on his part to exclude the application of the rule? I do not think it does. There is no other phrase or direction in the will indicative of any such intention, and I am not prepared to hold that the mere trust, on the determination of the limited interest, to divide the residuary estate is, by itself, a sufficient manifestation of an intention that the rule is not to apply. I think, on the true construction of the will, the rule ought to be applied; and that the interest of the testator in the copyrights comprised in the agreements I have mentioned must be valued at the expiration of one year from the date of his death, and the tenant for life be paid interest at 4 per cent. on the value so ascertained, commencing from the date of the death.

Upon looking at the other agreements, (A), (B) and (C), dealing with the copyrights other than those of which I have already disposed, I think that Mr. Ansley has established his contention that they are not accurately described as contracts of sale and purchase but are in the nature of contracts of joint adventure or partnership (1), and that the

(1) See Lindley on Partnership, 8th ed., p. 53, note (*r*).—F. P.

moneys coming thereunder to the testator's estate are profits or income earned by the contribution made by the testator to the joint adventure. From this it follows that the testator's interest in these copyrights is exactly within the third class of property dealt with by Parker V.-C. in *Meyer* v. *Simonsen* (1), and the interest of the testator under these contracts must be treated in the same manner as I have directed his interest under the other contracts to be treated—that is to say, a value must be set on the testator's interest as at the expiration of one year from his death, and the tenant for life will as from the death be entitled to receive 4 per cent. interest on that value. The surplus income derived from all the contracts will be invested and the income arising from such investments will also be receivable by the tenant for life.

The trustees will be authorized to retain the copyrights till further order. There is no trust for conversion.

Solicitors: *J. T. Lewis & Woods, for D. R. Evans & Jones, Newcastle Emlyn.*

(1) 5 De G. & Sm. 726.

G. M.

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1921
July 7, 8.

In re QUINN AND NATIONAL CATHOLIC BENEFIT AND THRIFT SOCIETY'S ARBITRATION.

[1921. Q. 2460.]

Friendly Society—Approval under National Insurance Act, 1911—*New Rules—Approval—Registration—Ultra Vires—Disputes—Arbitration—Appeal—Special Case—Friendly Societies Act*, 1896 (59 & 60 *Vict. c.* 25), *s.* 13, *sub-s.* 2—*National Insurance Act*, 1911 (1 & 2 *Geo.* 5, *c.* 55), *ss.* 23, *sub-s.* 2 (*iii.*), 27, *sub-s.* 3, 67.

The approval of the rules of a registered friendly society by the Commissioners, followed by their registration under s. 13 of the Friendly Societies Act, 1896, cures every antecedent informality or irregularity in the procedure or at the meeting by or at which such rules were adopted.

The reasoning in *Dewhurst* v. *Clarkson* (1854) 23 L. J. (Q. B.) 247, and *Rosenberg* v. *Northumberland Building Society* (1889) 22 Q. B. D. 373, applied; and *Butler* v. *Springmount Agricultural Dairy Society* [1906] 2 I. R. 193 followed.

No question as to the illegality of the rules of an approved friendly society can properly be made the subject of an arbitration under s. 67 of the National Insurance Act, 1911. It is not a matter of domestic administration.

Heard v. *Pickthorne* [1913] 3 K. B. 299, and *McEllistrim* v. *Ballymacelligott Co-operative Dairy Society* [1919] A. C. 548 followed.

Special Case.

This was a special case stated by Mr. Hugh Gamon for the opinion of the Court pursuant to s. 19 of the Arbitration Act, 1889. The appellant, James Quinn, was an insured member of the Central Branch No. 223 of the National Catholic Benefit and Thrift Society, a friendly society registered under the Friendly Societies Act, 1896, and approved under the National Insurance Act, 1911. He was also the secretary of the Central Branch which had its office in Liverpool. The chief executive body of the Society was the Board of Management, the members of which were elected by the General Council of the Society meeting annually for the purpose (inter alia) of electing members of the Board, confirming levies, and altering or amending the rules of the Society. At the 1916 annual meeting of the General Council a complete set of new rules was adopted, and it was resolved

that the area of the Liverpool districts should be divided into six new districts having separate new district councils. This new set of rules was never approved by the Insurance Commissioners in pursuance of ss. 14 and 27 of the National Insurance Act, 1911, or registered by the Registrar of Friendly Societies under s. 13 of the Friendly Societies Act, 1896. At the 1918 annual meeting of the General Council a completely new set of rules for the Society was again adopted comprising (inter alia) rules relating to the grouping in districts of the branches of the Society, each district to be governed by a district council. These 1918 Rules were approved by the Insurance Commissioners on November 22, 1918, and registered by the Registrar of Friendly Societies on December 7, 1918. At the 1919 annual meeting of the General Council the 1918 Rules were partially amended, which amendments were approved by the Ministry of Health on October 10, 1919, and registered by the Registrar of Friendly Societies on October 31, 1919. At the 1920 annual meeting the 1918 Rules were further partially amended, such amendments being similarly approved and registered.

After the 1916 annual meeting of the General Council differences arose as to various matters in connection with the administration of the Society between the Central Branch and several other Liverpool branches of the Society on the one hand, and the Board itself on the other.

Three several arbitrations took place after 1918 in connection with these differences, the second and third raising the question of the legality of the 1918 annual meeting, and awards were given in favour of the Society. Appeals therefrom by certain Liverpool branches were referred to the decision of Mr. S. L. Porter, barrister-at-law, the referee appointed for the purpose by the Insurance Commissioners, and the referee made his award in writing on June 14, 1919. In this award the referee dealt with the question whether new rules of the Society, not on the face of them ultra vires but passed at an invalidly constituted General Council, became valid on being approved by the Insurance Commissioners

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under s. 27 of the National Insurance Act, 1911, and registered by the Registrar of Friendly Societies under s. 13 of the Friendly Societies Act, 1896; and he held that such rules were so validated and therefore the 1918 Rules were binding on the Society as a whole. An appeal to have this award set aside was dismissed by the Divisional Court, and subsequently by the Court of Appeal. On February 27, 1920, James Quinn formally in writing demanded a fourth arbitration in accordance with the rules of the Society in a dispute between himself and the Society in connection with the 1919 annual meeting of the General Council. The dispute was referred to arbitration under r. 86 of the 1918 Rules, and an award given by the three arbitrators in favour of the Society on May 4, 1920.

On May 21, 1920, the appellant obtained leave from the Ministry of Health to appeal from this award, and on June 30, 1920, the Society lodged a reply to the appellant's particulars. This appeal was referred to Mr. Hugh Gamon for decision by the Ministry of Health, and was heard by him on September 22, 23 and 24, 1920.

The issues raised were similar in character to those raised in the appeal referred to S. L. Porter, and Mr. H. Gamon desired to ascertain the opinion of the Court and stated a special case asking the following questions (inter alia): (1.) To what extent, if at all, the appellant was estopped or prevented by the award of S. L. Porter from disputing the validity of the 1918 Rules. (2.) To what extent if at all the 1918 Rules were invalid on the ground that the 1918 annual meeting of the General Council was invalidly constituted. (3.) To what extent, if at all, the 1918 Rules were in the circumstances validated by the registration thereof or of the 1919 and 1920 amendments by the Registrar of Friendly Societies. (4.) To what extent, if at all, the 1918 Rules were invalid on the ground that they were ultra vires, if and because (*a*) they did not provide for the government of the Society in accordance with s. 23 of the National Insurance Act, 1911, (*b*) they did not provide for the representation or administration of the Central Branch in accordance

with the rights of its members, and the constitutional rules of the Society.

It was admitted by the parties to the hearing before Mr. Hugh Gamon that the appellant took an active part in the proceedings under the first and second arbitrations, and the litigation consequent thereupon, and also that the 1919 annual meeting of the General Council was properly constituted and held in accordance with the 1918 Rules, if such Rules were, in fact, valid so far as material.

Percival Smith for James Quinn. The appellant is not estopped by Mr. Porter's award from disputing the validity of the 1918 Rules. It was found by that award that persons were present at that meeting who had no right to be there. The meeting was therefore not validly constituted and the rules were not properly passed. On the third question I submit that registration pending disputes is not sufficient, and the Society is not entitled to rely upon the rules as validated: *Dewhurst* v. *Clarkson.* (1) The acknowledgment by the Registrar under s. 13, sub-s. 2, of the Friendly Societies Act, 1896, is evidence that the entry has been duly made in the book, but cannot validate antecedent irregularities.

Courthope Wilson K.C. and *H. P. Glover* for the Society. On the first question it is immaterial whether there was an estoppel or not. On the second question we submit that the general meeting of 1918 was in fact properly constituted. No one was excluded, and if there were persons present who were not entitled to be there they took no part in the proceedings and did not vote. If our contention is right on the third question this second question is also immaterial. On the third question we submit that the approval of the Insurance Commissioners of the 1918 Rules and the registration of the same by the Registrar of Friendly Societies under s. 13, sub-s. 2 (2), cures any antecedent defects in

(1) 23 L. J. (Q. B.) 247.

(2) The material provisions of the Friendly Societies Act, 1896, and of the National Insurance Act, 1911, are as follows:—

The Friendly Societies Act, 1896, s. 13, sub-s. 1: "An amendment of a rule made by a registered society shall not be valid until the amendment has been registered under this

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procedure at the meeting, and renders the rules completely valid. *Dewhurst* v. *Clarkson* (1) is in our favour, and the appellant can only rely upon the dissenting judgment of Erle J. *Rosenberg* v. *Northumberland Building Society* (2) followed *Dewhurst* v. *Clarkson* (1), and was a decision under the Building Societies Act, 1874, ss. 18, 20, where the certificate of the Registrar was conclusive as to the validity of the rules. In the Irish case of *Butler* v. *Springmount Agricultural Dairy Society* (3) the words of s. 10, sub-s. 3, of the Industrial and Provident Societies Act, 1893, on which the decision in that case turned, were practically identical with those of s. 13, sub-s. 2, of the Friendly Societies Act, 1896. The Court will follow an Irish decision upon identical words in a similar statute. As to question 4 of the special case the question whether or no the rules are ultra vires is not a dispute between members and the Society which can be referred to arbitration under s. 67 of the National Insurance Act, 1911: *Heard* v. *Pickthorne* (4); *McEllistrim* v. *Ballymacelligott Co-operative Dairy Society.* (5) The Court will not reopen these matters.

Percival Smith in reply. The Court is not bound by a decision of an Irish Court.

[He also referred to *Crichton* v. *Dalry Myrtle Lodge of Free Gardeners* (6) on the question of the rules being ultra vires.]

EVE J. This is a special case stated for the opinion of the Court under s. 19 of the Arbitration Act, 1889. In dealing

Act, for which purpose copies of the amendment, signed by three members and the secretary, shall be sent to the registrar."

Sub-s. 2: "The registrar shall, on being satisfied that any amendment of a rule is not contrary to the provisions of this Act, issue to the society an acknowledgment of registry of the amendment, and that acknowledgment shall be conclusive evidence that the amendment is duly registered."

Sect. 27 of the National Insurance Act, 1911, sub-s. 3, provides as follows: "Where under any Act regulating the constitution of an approved society the rules of the society are required to be registered, any rules approved under this section by the Insurance Commissioners shall forthwith be registered, but until so registered shall have effect as if they had been duly registered."

(1) 23 L. J. (Q. B.) 247.
(2) 22 Q. B. D. 373.
(3) [1906] 2 I. R. 193.
(4) [1913] 3 K. B. 299.
(5) [1919] A. C. 548.
(6) (1904) 6 F. 398.

with it I am not concerned, nor indeed have I any right to enlarge on the merits of this long-standing dispute. My province is restricted to answering to the best of my ability the request of the learned arbitrator where he says: "I desire to ascertain the opinion of the Court on the following questions." [On question 1 his Lordship held that in the circumstances the appellant was not estopped or otherwise prevented by the award of Mr. Porter from raising the point as to the validity of the 1918 Rules and continued:] I pass from that to question 2. I shall assume for the moment that Mr. Porter's finding that the annual meeting of 1918 was invalidated by the admission thereto of the representatives of the new Liverpool district is well founded, and that the meeting being an invalid meeting was incompetent to pass any resolutions adopting the new rules. The persons to whose presence exception was taken do not appear to have taken any active part in the meeting or to have attempted to exercise any voting power. In these circumstances it is difficult to see how their mere presence in the room could alone have rendered the meeting invalid. But Mr. Porter so found and I assume his finding to be a right one. Even so the answers to this second question and to question No. 1 are really immaterial by reason of the answer which I think is the only one that can be given to question No. 3. On the authorities I must hold that the approval of the 1918 Rules by the Commissioners followed by their registration under the Act cured every irregularity in the procedure, or at the meeting by or at which they were adopted. It is, in my opinion, impossible to read the decisions in *Dewhurst* v. *Clarkson* (1) and in *Rosenberg* v. *Northumberland Building Society* (2) without being convinced that the reasoning by which those decisions were arrived at is applicable to this case. The wording of the Friendly Societies Act, 1896, is certainly stronger than any that is to be found in the Building Societies Act, and although I agree, if I may respectfully say so, with some criticisms made by Moulton L.J. in *Osborne* v. *Amalgamated Society of*

(1) 23 L. J. (Q. B.) 247. (2) 22 Q. B. D. 373.

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Railway Servants (1) on the judgments in the *Rosenberg Case* (2) it would be my duty, were I dealing with a case under that Act, to follow that decision; much more so in this case where I have wording which indicates, as it seems to me, far more strongly that the certificate is to be conclusive and binding am I so bound. Sect. 13, sub-s. 2, enacts as follows. [His Lordship read the sub-section.]

I cannot think that only means that the acknowledgment is conclusive that the actual entry has been made in the book and the registration completed; it must mean that everything antecedently necessary to the registration has been duly carried out, and that when the certificate is once issued it is incompetent for anybody to raise objections on points of procedure and detail in reference to matters antecedent to the registration. That view is certainly strengthened in this case by the provision in s. 27 of the National Insurance Act, 1911, which provides that so soon as the rules shall have been approved by the Insurance Commissioners they shall be registered, but until so registered they shall have effect as if they had been duly registered. I think, therefore, it is impossible, in view of the decisions to which I have been referred, to come to any other conclusion than that registration effectually cures any antecedent irregularity in procedure. That opinion has been expressed by the Court of Appeal in Ireland in *Butler* v. *Springmount Agricultural Dairy Society* (3) in construing an exactly similar section of the Provident Societies Act, and although, as was pointed out by Mr. Smith, the Irish decision does not bind this Court, where the Court of Appeal in Ireland, composed as it was of very eminent judges, has imposed a particular construction on identical words, it would require a very great deal of argument to convince me that I should be right in imposing a different construction on the same words in another statute merely because the Court that imposed that construction was sitting in Ireland and not in this country. The result is, so far as the Rules of 1918 are concerned, any

(1) [1909] 1 Ch. 163, 179. (2) 22 Q. B. D. 373.
(3) [1906] 2 I. R. 193.

invalidity which was due to informality or irregularity antecedent to their passing is cured by their registration. But then, it is said, the complaint by the appellant against the rules is not merely that they were invalidly passed, but they are in their nature illegal and ultra vires, and he says they are ultra vires because they do not comply with the statutory provisions of s. 23 of the Act of 1911, and, in particular, they do not make adequate provision for the representation of the particular branch in accordance with the rights of the members under the regulations and rules of the Society. I am of opinion that no question as to the illegality of the rules can be properly made the subject of an arbitration under the statute. It is not a matter of domestic administration which, under s. 67 of the Act, ought to go to arbitration. That was the view of the Court of Appeal in the case of *Heard* v. *Pickthorne* (1), where the suggestion was that the rules were ultra vires, and also in the recent case of *McEllistrim* v. *Ballymacelligott Co-operative Dairy Society* (2), where the Lord Chancellor in dealing with the matter says: "The question here is whether certain rules were illegal and ultra vires. Such a dispute is not a dispute between a member and the Society within the meaning of the statute. The appellant in this case professes that he has not quarrelled with the Society as lawfully constituted, but complains that the constitution of the Society has been illegally altered. The dispute, therefore, rightly viewed, is a dispute between the persons as to the true constitution of the Society. I adopt upon this part of the case the reasoning and the decision of the Court of Appeal in *Heard* v. *Pickthorne*." (1) There is, in my opinion, no jurisdiction to determine this question of illegality or ultra vires in the arbitration, but so far as the question itself is concerned I am of opinion that the rules were not invalid on the ground that they were ultra vires either because they did not comply with the section of the Act, or because they did not provide for the representation referred to in question 4 (*b*). The extent to which the government of the

(1) [1913] 3 K. B. 299. (2) [1919] A. C. 548, 561.

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Society is to be committed to the members at large is defined in the Act itself. The section dealing with the matter provides that the constitution of the Society must provide to the satisfaction of the Insurance Commissioners for its affairs being subject to the absolute control of its members.

The test is whether or no the Commissioners are satisfied that the statutory provisions have been properly provided for, and it is not for me to say whether or no as a Commissioner I might have arrived at a different view. In one sense, no doubt, it is a judicial discretion which the Commissioners exercise, but once they are satisfied it is not for this or any other Court to say they ought not to have been satisfied, unless the exercise of the discretion has been so perverse as to show it was never in fact exercised. That disposes of the questions down to and including No. 4. [His Lordship then dealt with the remaining questions submitted to him which do not call for notice, and remitted the matter to the arbitrator with the answers.]

Solicitors: *Jaques & Co., for Layton & Co., Liverpool; E. Hoskinson, Liverpool.*

G. M

P. O. LAWRENCE J.

1921

July 15.

In re WILLCOCKS.

WARWICK *v.* WILLCOCKS.

[1921. W. 1822.]

Will—Legacies—Bequest of Stock—Whether General or Specific.

The bequest of a sum of stock in pounds, shillings and pence, being the exact amount of the stock the testator possesses at the date of his will, is a general legacy unless there is something else on the face of the will to indicate that the testator intended it to be specific.

Jeffreys v. *Jeffreys* (1743) 3 Atk. 120 not followed.

Adjourned Summons.

Ellen Willcocks (married woman) by her will made in March, 1918, appointed her husband, the defendant A. Willcocks, her executor, and after bequeathing to her father, the plaintiff Samuel Warwick, 948*l.* 3*s.* 11*d.* Queensland 3½ per cent. Inscribed Stock, and to her mother, the plaintiff Sarah Warwick, 613*l.* 18*s.* 11*d.* Victoria 3½ per cent. Consolidated Stock and 300*l.* Queensland 3 per cent. Stock, gave "all the remainder of my real and personal estate" unto her husband, the defendant.

The testatrix at the date of her will was possessed of the exact three sums of stock bequeathed to her parents, and no more of any of the said stocks. In 1919 she sold the three sums of stock and invested the proceeds with other moneys in the purchase of real estate. On her death in October, 1920, the question arose whether the above bequests to her parents were general legacies, or were specific legacies which had been adeemed, and they issued a summons to determine the matter.

Jenkins K.C. and *A. Adams* for the plaintiffs. A gift of a sum of stock is a general legacy unless there is something on the face of the will to make it specific: Hawkins on Wills, 2nd ed., p. 352; *Robinson* v. *Addison* (1); *In re Tyler* (2),

(1) (1840) 2 Beav. 515.

(2) (1891) 65 L. T. 367.

P. O. LAWRENCE J. 1921 WILLCOCKS, *In re.* WARWICK *v.* WILLCOCKS.

and the mere fact that a testator mentions the exact sum of stock in pounds, shillings and pence that he possesses at the date of his will does not make the gift specific. *Jeffreys* v. *Jeffreys* (1) will be cited against us, but that decision stands alone and cannot be reconciled with the general current of authorities, and is disapproved of by all the text writers: Hawkins on Wills, 2nd ed., p. 353; Roper on Legacies, 4th ed., p. 212; Theobald on Wills, 7th ed., p. 150; Jarman on Wills, 6th ed., vol. ii., pp. 1076–1077. The language of the residuary bequest does not make the legacies specific: *Purse* v. *Snaplin.* (2)

Owen Thompson K.C. and *H. J. Mackay* for the defendant. On the face of this will the testatrix shows a sufficient intention to deal specifically with the sums of stock she then had in pounds, shillings and pence. In *Jeffreys* v. *Jeffreys* (1) a legacy, not of stock in round numbers, but of 2702*l.* 3*s.* Bank Stock, being the exact amount the testator had, was held specific. The case was not cited in *Robinson* v. *Addison* (3) nor in *In re Tyler* (4), and has never been overruled or questioned by the Court in any reported case. The opinion of text writers is, no doubt, of some weight, but their tendency is to follow each other. The real principle is whether a testator is speaking in his will of some particular property which he then had. It has never been decided that where you find an exact sum described in pounds, shillings and pence that that is a direction to the executors to purchase that exact sum for the legatee. There is no general rule which makes a bequest of stock a general legacy, but all such cases depend on the intention of the testator to be collected from the will and considered as a whole: *In re Nottage* (5); *In re Pratt.* (6) Here you have an exact description in pounds, shillings and pence of sums of stock which is the indication in the will that she is describing and dealing specifically with what she then had. Further, the use

(1) 3 Atk. 120.
(2) (1737) 1 Atk. 414.
(3) 2 Beav. 515.
(4) 65 L. T. 367.
(5) [1895] 2 Ch. 657, 664.
(6) [1894] 1 Ch. 491.

of the word "my" in the residuary bequest also shows that in the preceding bequests she is dealing with what she then had.

P. O. LAWRENCE J. It is not disputed that a legacy of stock is prima facie general although the testator may have had the exact amount of stock at the date of his will. It is argued, however, by counsel on behalf of the residuary legatee that there is an indication on the face of the will in the present case that the three legacies of stock are specific, first, because the odd shillings and pence are mentioned in the bequests of the Queensland $3\frac{1}{2}$ per cent. Stock and of the Victoria Stock; and secondly, because of the language of the gift of residue. As to the first point, I am of opinion that there is no distinction in principle between a gift of a sum of stock in round numbers and a gift of a sum of stock which runs into pounds, shillings and pence. In Hawkins on Wills, the learned author points out that the possession of the particular sum may be the motive of fixing the amount of the bequest, but yet the testator may intend to give it in the form of a general legacy. This reasoning appears to me to apply equally to a gift of stock not in round numbers as to a gift of stock in round numbers. *Jeffreys* v. *Jeffreys* (1) is the case which is relied upon in support of the contention to the contrary. There Fortescue M.R. stated as one of his reasons for coming to the conclusion that the legacy was specific—that the stock which the testator had agreed exactly "even in the odd money." This case, so far as I am aware, has never been followed, and in Hawkins on Wills and Roper on Legacies is treated as of doubtful authority. The more modern text writers, Jarman and Theobald, take the view that *Jeffreys* v. *Jeffreys* (1) is opposed to the more modern decisions and would probably not now be followed. This view is, I think, borne out by the decision in *Robinson* v. *Addison* (2) although *Jeffreys* v. *Jeffreys* (1) does not appear to have been cited to the learned judge who decided

(1) 3 Atk. 120. (2) 2 Beav. 515.

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that case. In these circumstances I do not propose to follow *Jeffreys* v. *Jeffreys*. (1) In my opinion it would be drawing too fine a distinction to hold that a legacy of stock was general where the sum happened to be a round sum, but was specific where the sum happened to be one which ran into pounds, shillings and pence.

The other point is that the testatrix in giving the residue to her husband describes it as "the remainder of *my* real and personal estate." It is contended that as the only bequests which precede the gift of residue are the legacies in question the language used by the testatrix points to the conclusion that the legacies are specific. In my opinion it would be attaching too much importance to the words of the residuary gift to hold that they had this effect. Mr. Adams has pointed out that in the case of *Purse* v. *Snaplin* (2) the legacies of stock were held to be general notwithstanding the introductory words "I dispose of my estate in manner following" which preceded the legacies. In my judgment the expression "the remainder of my real and personal estate," which is very commonly adopted in a gift of residue, does not constitute a sufficient context to exclude the rule that a legacy of stock is a general and not a specific legacy.

Solicitors: *Sydney James; Vizard, Oldham & Co.*

(1) 3 Atk. 120. (2) 1 Atk. 414.

H. L. F.

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Dec. 7, 8, 9, 14, 15, 16.

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Jan. 17, 18, 19, 20, 21, 24, 25, 26, 27, 28, 31;
Feb. 1, 2, 3;
July 28.

In re BADISCHE COMPANY, LIMITED.

[1917. B. 984.]

In re BAYER COMPANY, LIMITED.

[1917. B. 1710.]

In re GRIESHEIM ELEKTRON, LIMITED.

[1917. G. 1074.]

In re KALLE AND COMPANY, LIMITED.

[1917. K. 497.]

In re BERLIN ANILINE COMPANY, LIMITED.

[1917. B. 2036.]

In re MEISTER LUCIUS AND BRUNING, LIMITED.

[1917. M. 504.]

War—Emergency Legislation—Winding Up of Enemy Business—Debts—Claims under Contracts current at Outbreak of War—Breach—Damages—Enemy Control—Illegality—Frustration—Dissolution of Contract—Trading with the Enemy Amendment Act, 1916 (5 & 6 *Geo.* 5, *c.* 105), *s.* 1.

For many years there existed in Germany works for the manufacture of dyestuffs (Farbenfabriken), belonging to a German concern which carried on business in England through agents. In 1878 the agents were a partnership firm consisting of A. and two other persons. In 1895 A. was the sole partner. In that year a limited company was formed and registered in England, and in 1898 its name was changed to the B. company. Its original capital was 5000*l.*, divided into 500 shares of 10*l.* each, of which A. held 5 shares and the German concern 470. In 1905 the capital was increased to 25,000*l.* by the issue of 2000 new shares fully paid, and in 1909 it was increased to 100,000*l.* by the issue of 7500 like shares. At the times material the German concern held 9912 shares and A. 20.

By an agreement dated in 1910 between the German concern and the B. company, the district of the German concern was defined as the whole world outside the United Kingdom with the Channel Islands and the Isle of Man, and the district of the B. company as the United Kingdom, the Channel Islands and the Isle of Man. The German concern bound itself not to import goods into the B. company's district except for the purposes of the B. company, and the B. company bound itself not to import into the German concern's district except for the purposes of the German concern. By an agreement, dated in 1912, between the

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same parties and operative for seven years, the German concern bound itself to sell to the B. company (and to no one else in the United Kingdom) for sale in the United Kingdom anilines and chemicals manufactured by the German concern, and the B. company bound itself to buy from the German concern (and from no other manufacturer) such dyestuffs. By unwritten agreement the B. company was bound from its inception to import only from the German concern.

From the time of the registration of the B. company A.'s firm ceased to act as agents for the German concern. The B. company sold, not in the name of the German concern, but in its own name and as a principal; but it announced to the world on its office windows, and to its customers on notepaper and other documents, and by books, catalogues and samples, that it was the sole importer in England of the manufactures of the German concern. It was thus brought home to the customers that they were buying the produce of the German concern as before. The new régime was in effect a continuation of the agency though legally the agency had ceased. The business of the B. company was conducted by A. and another director, both resident in England. The German concern supplied them with lists of prices to be charged by the German concern to the B. company, the B. company making a profit by selling to customers at a price higher than the list. If an English customer offered to buy at a price lower than the list, the German concern would reduce its price to the B. company accordingly. The overwhelming shareholding of the German concern in the B. company caused it to be vitally interested, as seller and buyer, in the contract between itself and the B. company and as seller in the contract between the B. company and its customer. Down to the outbreak of war between England and Germany on August 4, 1914, the control of the B. company, its business, affairs and acts, were in the hands of the German concern.

On April 1, 1914, the B. company entered into a contract with a British firm for a supply to the firm of dyestuffs, identified by letters and numbers as the manufacture of the German concern or of other German manufacturers, of which samples from Germany were in the possession of the British firm. It was provided that any duties imposed by the British Government on the goods should be paid by the British firm or the price should be advanced accordingly. It was further provided that deliveries or orders off the contract might be suspended by either party if any contingency should arise beyond the control of the parties, such as fire, accidents, war, strikes or the like. The contract covered a period unexpired at the outbreak of war. At that date quantities of dyestuffs remained undelivered and were never afterwards delivered.

An order was made by the Board of Trade, under s. 1 of the Trading with the Enemy Amendment Act, 1916, for the winding up of the business of the B. company, and a controller appointed. In the winding up the British firm claimed damages for breach of contract in the non-fulfilment of deliveries.

The controller resisted the claim on the grounds: (1.) that the contract was dissolved at the outbreak of war, (*a*) because the B. company was an enemy or of enemy character within the principles

laid down in *Daimler Co.* v. *Continental Tyre and Rubber Co.* [1916] 2 A. C. 307; (*b*) because the parties contracted on the footing that the goods should come from Germany; (*c*) because continued existence or performance of the contract would involve intercourse with, or tend to assist the enemy; (2.) that owing to the suspension clause no right to damages had yet arisen; (3.) that the object of the contract had been frustrated, (*a*) because the period of suspension was indefinite and beyond the contemplation of the parties; (*b*) because performance of the contract was prevented by Government action or embargo; (*c*) because the basis of the contract was that the importation of the goods to be supplied should continue to be possible and by reason of war it was rendered impossible.

On application to the Court by the controller for directions whether the claim should be admitted as a debt due from the B. company:—

Held, that at the date of the outbreak of war the B. company assumed enemy character, on the principles laid down in *Daimler Co.* v. *Continental Tyre and Rubber Co.*, and, accordingly, that the contract became dissolved by the outbreak of war as being a current contract entered into with a company which eo instanti assumed enemy character; and that, the abrogation of the contract by outbreak of war being founded on public policy, the presence of a suspension clause in the event of war did not assist the claimant, and if "war" in the clause included war between England and Germany the clause was void as against public policy.

Held, therefore, that the claim must be rejected.

But *held*, further (assuming that the B. company had not assumed enemy character at the outbreak of war), that the claim must fail on the following grounds: (1.) that, the contract being for the supply of goods to be obtained from Germany, further performance on the outbreak of war involved intercourse with the enemy and became illegal accordingly; (2.) that, the contracts having been made on the basis that the existing commercial conditions would continue and that basis having ceased to exist by outbreak of war between England and Germany, the commercial object of the contract had been frustrated, and the contract was dissolved at the outbreak of war.

Held, also, that the suspension clause was not intended by the parties to apply to war between England and Germany. See *Veithardt & Hall* v. *Rylands Brothers* (1917) 116 L. T. 706; 86 L. J. (Ch.) 604; *Ertel Bieber & Co.* v. *Rio Tinto Co.* [1918] A. C. 260, 272, 273.

Held, also, that the doctrine of frustration applies to contracts for the sale of unascertained goods. *Blackburn Bobbin Co.* v. *Allen & Sons* [1918] 1 K. B. 540, 550; *Thornett & Fehr* v. *Yuills* (1920) 37 Times L. R. 31; *Veithardt & Hall* v. *Rylands Brothers*, and *E. Hulton & Co.* v. *Chadwick & Taylor* (1918) 34 Times L. R. 230 considered.

The principles laid down in *Daimler Co.* v. *Continental Tyre and Rubber Co.*, and the law as to illegality (owing to war) of contracts and as to frustration, fully discussed; and the authorities collected.

THE following statement of facts is from the judgment: "These are six applications by the respective controllers of six limited companies registered in England, in respect of each

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of which an order has been made by the Board of Trade under the Trading with the Enemy Amendment Act, 1916, for the winding up of the business carried on here by the company. Each controller asks for the court's direction upon the point whether claims against his company, in respect of certain pre-war contracts, should be admitted as debts due from the company. The claims are in the main claims for damages for breach of contract arising from the non-fulfilment thereof. In the case of one or more contracts which have in fact been fulfilled, there are claims for rebates under the terms of the contracts. The contracts are contracts for the sale by some one or more of the companies to the claimants of dyestuffs. The number of the claimants is large, the number of the contracts is legion. By arrangements made in the earlier stages of the proceedings a selection was made from among the contracts, and these selected contracts have been put in suit before me; and in regard to these my decision has now to be given. The selected contracts amount to thirty-one in number, so that I have in substance been engaged in trying thirty-one actions for breach of contract. It is to be hoped that these selected contracts constitute a fair sample of the bulk, and that my decision in regard to them will enable the controllers to deal with the remainder.

"The contracts were treated before me as being divided into two groups, that is to say, contracts for the supply of indigo and contracts for the supply of other colours. The reason for this division is the fact that certain considerations (as to which more hereafter) apply to the former and not to the latter, and in this judgment I will deal in the first instance with contracts for the supply of colour other than indigo. The contracts all covered periods unexpired on August 4, 1914. After the outbreak of war between this country and Germany the quantities remaining deliverable under the then current contracts were not (except in a few exceptional cases) in fact delivered and accordingly a claim by the purchasers for breach of contract by the vendors would prima facie arise.

"These claims are resisted by the controllers on several grounds. First, it is alleged that each contract was dissolved on the outbreak of war (*a*) because the limited company (the vendor) was an enemy or of an enemy character within the principles laid down by the House of Lords in the Continental Tyre case (1); (*b*) because the limited company (the vendor) entered into the contract as agent for a German concern and therefore as agent for an enemy; (*c*) because the parties to the contract contracted on the footing that the goods sold would come only from Germany; (*d*) because the continued existence or further performance of the contract would involve intercourse with the enemy or tend to assist the enemy. Secondly, it is alleged that the suspension clause contained in the contract came into operation at the outbreak of war, that consequently no right to damages had yet arisen; and that during the period of suspension there had been no anticipatory breach by the vendor companies. Thirdly, it is alleged that the contract or the object of the contract had been frustrated (*a*) because the period of suspension under the suspension clause was indefinite and beyond the contemplation of the parties; (*b*) because the performance of the contract as contemplated by the parties was subsequently to the outbreak of war prevented by Government action or embargo; (*c*) because it was the basis of the contract that the importation of the goods to be supplied and of raw materials necessary for their manufacture should continue to be possible and by reason of the war such importation was rendered impossible.

"In the first instance I propose to discuss these points in connection with the Bayer Co., Ld., and the non-indigo contracts to which it is a party as sole vendor, in the hope that, after covering that contractual area and deciding upon the claims arising therein, the remaining non-indigo cases may be disposed of in a more summary manner. I choose to start with the Bayer Co., Ld., because in that case there are five contracts in which it figures as sole vendor and in respect of which there are four

(1) [1916] 2 A. C. 307.

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separate claimants; and these contracts appear to me to include fair types of the non-indigo contracts. These contracts are as follows:—

"First, a contract (J. 2) dated April 1, 1914, for the sale to the Bradford Dyers Association, Ld., of 25 tons of direct convention blacks as per list attached, delivery to be taken within twelve months from April 1, 1914, in casks, kegs or tins as required, carriage paid to the various branches of the association, all the colours guaranteed equal to standard of samples in the possession of the association. Whenever a duty is imposed on the products (the subject of the contract) the duty is to be paid by the association or the prices advanced accordingly. Deliveries or orders off this contract might for the time being be suspended by either party should any contingency arise beyond the control of either party, such as fire, accidents, war, strikes or the like. The colours included in the list attached are by letters or numbers identified as being the products either of the Farbenfabriken vormals Friedrich Bayer & Co. of Elberfeld or of a convention of German manufacturers of which convention the Farbenfabriken was a member.

"Secondly, a contract (K.) dated September 1, 1912, for the sale to the Bradford Dyers of 350 tons of coal-tar colours which shall include benzo acid, basic or other colours or developers which may be manufactured or sold by the Bayer Co., Ld., with the exception of fancy alizarine colours and algol colours and certain convention colours which were or were to be the subject of separate contracts. Prices were 'as per list,' but the Bradford Dyers were not to pay more than the lowest prices paid by their competitors in the piece or warp dyeing trades. Delivery was to be taken between November 1, 1912, and December 31, 1914, in casks, kegs or tins as required, carriage paid to the various branches of the Bradford Dyers. All the colours were guaranteed equal to standard samples in the possession of the Bradford Dyers. There was a duty clause referring to duties imposed by the British Government, and a provision that deliveries or orders might for the time

being be suspended by either party should any contingency arise beyond the control of either party, such as fire, accidents, war, strikes or the like, 'the period of this contract being extended accordingly.'

"Thirdly, a contract (L.) dated December 1, 1913, for the sale to the British Cotton and Wool Dyers Association, Ld., of 300 tons of diamond blacks, quality and price as per list attached. Delivery was carriage paid, to be completed within 18 months of December 1, 1913. There was a duty clause, and a provision that deliveries or orders might for the time being be suspended by either party should any contingency arise beyond the control of the buyer or seller, such as fire, war, strikes or similar unforeseen accident. The words 'diamond blacks' mean blacks manufactured by the Farbenfabriken in Germany; and the list attached further identifies, by means of letters and numbers, the goods comprised in the contract as being goods manufactured by the Farbenfabriken.

"Fourthly, a contract (M.) dated January 26, 1914, for the sale to the United Turkey Red Co., Ld., of 8,960 lbs. of dye stuff, to be delivered in the option of the Turkey Red in such quantities as they might require of the colours as per enclosed lists (Group No. 3). Delivery was to be within 12 months. There was a duty clause. The importation of all the colours contracted for into France and the United States of America was prohibited; and there was a provision that deliveries might be suspended for the time being should any contingency arise beyond the control of the sellers, such as fire, accidents, war, strikes or the like. The list of colours attached to the contract identifies the goods comprised therein, either by the use of proprietary words such as benzo or by reference to catalogue letters or numbers, as being goods manufactured by the Farbenfabriken. Further the goods are referred to as 'patented colours,' although in many cases the patents of the German manufacturers had run out.

"Fifthly, a contract (O.) dated July 12, 1912, for the sale to F. Scott & Co., Ld., of 1 ton (increased to $2\frac{1}{2}$ tons) of

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rongalite, carriage paid to the purchaser's address within 12 months from July 12, 1912 (extended to 24 months from that date). Although the contract by its terms had expired before the outbreak of war, it was treated by both parties as still a current contract at that date. There was a duty clause, and a provision that, if, from fire, flood, strikes, war, an explosion or similar unforeseen accident, the vendors were prevented from making or the buyers using the article contained in the contract, the contract so far as time of delivery would not be binding. Be it observed that the vendors (the Bayer Co., Ld.) never manufactured, or had the means of manufacturing, an ounce of rongalite or any other dye stuff. Rongalite was not manufactured by the Farbenfabriken. It was made by the Badische Anilin and Soda Fabrik in Germany.

"I will now consider what for convenience may be termed the Continental Tyre point. It is for this purpose necessary to investigate the shareholding, management and constitution of the Bayer Co., Ld. The history of the conception, birth and pre-war career of the Bayer Co., Ld., is as follows:—

"For many years past there existed in Germany large works or farbenfabriken for the manufacture of dyestuffs at Elberfeld and Leverkusen. They belonged to a German concern called the Farbenfabriken vormals Friedrich Bayer & Co. This German concern carried on business in this country by means of agents who sold here as agents for and in the name of the German concern. In the year 1878 those agents were a partnership firm consisting of three persons, namely, Mr. Bryce, a Mr. Rumpff (who was a son-in-law of Friedrich Bayer) and a Mr. Alexander who was called as a witness before me. Owing to the deaths of his partners Mr. Alexander was in the year 1895 the sole partner in the firm which acted as agents here for the German concern. In that year, on December 11, there was registered in this country a limited company, under the name of the Elberfeld Farbenfabriken Co., Ld.; in the year 1898 its name was changed to the Bayer Co., Ld. The original capital

was 5000*l.*, divided into 500 shares of 10*l.* each, which were allotted as follows:—

Henry Theodore Bottinger of Elberfeld ..	5 shares
Friedrich Bayer	5 shares
Carl Duisberg	5 shares
Carl Hulsenbuch	1 share
Hermann König	5 shares
William Taylor Alexander of Manchester ..	5 shares
Arthur Keller of Manchester	1 share
Hermann Matthis of Elberfeld	1 share
William Gansen of Elberfeld	1 share
Fritz Bock of Elberfeld	1 share
The Farbenfabriken	470 shares

The signatories were the ten individuals above named. The seven first named individuals were the directors. Bottinger was the chairman of directors, Mr. Alexander was managing director and Mr. Keller was a manager and also the secretary. By the articles of association the right to transfer shares was carefully restricted. By article 53, two members personally present constituted a quorum at a general meeting; by article 66, every share conferred one vote; by article 88, until otherwise determined by the directors, the quorum for a meeting of directors should be two directors. The capital was increased in 1905 to 25,000*l.* by the issue of 2000 new shares of 10*l.* each fully paid, and in 1909 to 100,000*l.* by the issue of 7500 new shares of 10*l.* each fully paid. Sundry transfers of shares took place from time to time, and at the times material to this case the shareholding stood as follows, H. T. Bottinger, 20 shares; Friedrich Bayer, 20 shares; Carl Duisberg, 20 shares; Dr. Nieme of Leverkusen, 4 shares; Mr. Alexander, 20 shares; Mr. Winstanley, 4 shares; and the Farbenfabriken 9912 shares. Total 100,000 shares. Of these gentlemen all except Dr. Nieme were directors of the limited company. Bottinger was chairman and director of the Farbenfabriken, Duisberg was its general manager and a director, Bayer was its managing director, Mr. Winstanley had become a director of the limited company in 1908.

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"By an agreement dated April 6, 1910, and made between the Farbenfabriken of the one part and the limited company of the other part, the district of the Farbenfabriken was defined as including the whole world outside the United Kingdom with the Channel Islands and the Isle of Man, and the district of the limited company was defined as including the United Kingdom, the Channel Islands and the Isle of Man only. By clause 3 the Farbenfabriken bound itself not to import goods into the limited company's district except goods imported for the purposes of the limited company, and by clause 4 the limited company bound itself not to import goods into the district of the Farbenfabriken except goods imported for the purposes of the Farbenfabriken. By an agreement dated October 4, 1912, made between the same parties and operative for seven years, the Farbenfabriken bound itself to sell to the limited company for sale in the United Kingdom (and with an immaterial exception of intermediate products to sell to no one else in the United Kingdom) anilines, alizarines and general chemicals manufactured by the Farbenfabriken. The limited company on the other hand bound itself to buy from the Farbenfabriken all such goods manufactured by the Farbenfabriken, and not to buy such goods from any other manufacturer except with the consent in writing of the Farbenfabriken. In addition to this last mentioned written agreement, Mr. Alexander told me that from its inception the limited company was bound by unwritten agreement to import only from the German concern and not otherwise except with their consent.

"From the time of the registration of the English company Mr. Alexander's firm ceased to act as agents for the German concern. The English company superseded it, but it did not sell in the name of the German concern. It sold in its own name and as a principal; but it announced to the world on its office windows, and to its customers on its notepaper and other documents, that it was the sole importer here of the products manufactured by the Farbenfabriken in Germany. It distributed and sent, or caused

to be distributed and sent, to its customers books and catalogues and samples of the products of the German concern. The books and catalogues identified, partly by name and partly by letters and numbers, the different shades of colour manufactured by the German concern, the different chemical constituents thereof and the various conditions which they were calculated to fulfil. The result was to bring home to the customers that what they were buying was the produce or manufacture of the German concern, just as much as was the case in the former days when the agents sold in the name and on behalf of the German concern. Mr. Alexander put it that the new régime 'was a continuation of the agency, and the people of this country knew by direct intercourse with us as well as by propaganda that we were the agents for the Farbenfabriken of Elberfeld.' In form, however, and from the strictly legal point of view agency had ceased. A new procedure took its place. The business of the English company was in fact conducted by Messrs. Alexander and Winstanley, the directors resident in England. The German concern supplied them with a list of prices, which was revised from time to time, that is to say, prices to be charged by the German concern to the English company. The English company sold to the English customer at a price higher than the price in the list, the difference in price and any difference in discounts constituting profit to the English company. In cases where an offer was obtained from an English customer at a price below the price then ruling in the German concern's list of prices, then (to use Mr. Alexander's words) 'that offer would be, in our own phraseology, put before the German firm with a view to getting their price reduced so that we might meet that offer.' On some occasions the English customer of the English company would go over to Elberfeld with Mr. Alexander, to assist in obtaining the necessary reduction of the price by the German concern. It is obvious that, although the outward forms were punctiliously observed of a sale by the German company to the English company as an independent principal

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and a resale by the English company as an independent principal, the real position was in truth different. The overwhelming shareholding of the German concern in the English company caused it to be vitally interested not only in the contract between itself and the English company (and that both as seller and buyer) but also in the contract between the English company and the English customer. The English company was no doubt a separate legal entity, but the German concern was substantially, and apart from form, both vendor and purchaser in the former case and the vendor in the latter case. In so far as any judgment or decision would have been required (if a conflict had arisen) affecting the price or other terms of either contract, the judgment or decision would and could only have been the judgment or decision of the German concern and its officials. The fact that no conflict did arise, and that Messrs. Alexander and Winstanley were allowed to carry on in this country without the German concern finding it necessary or expedient to exercise its control, may be of importance from one point of view, but does not affect the truth as to the actual position of affairs. At every moment of time down to the outbreak of war the control of the limited company, its business, its affairs and its acts, were in the hands, and at the mercy, of the German directors, the German shareholders and, ultimately in the last resort, the Farbenfabriken."

Leslie Scott K.C. and *Dighton Pollock* for the Berlin Aniline Co. (1)

Frustration is an alternative to the *Continental Tyre* point—if the company is an enemy concern, it is unnecessary to go into the subject of frustration; frustration must be dealt with on the supposition that the *Continental Tyre* point is decided against the controllers.

(1) The principles of law, upon which the claims were resisted, being the same in each case, it was arranged that the separate heads of argument for the controllers should be dealt with by separate counsel, on behalf of them all—namely, frustration by *Leslie Scott K.C.*, illegality by *Cyril Atkinson K.C.*, the *Continental Tyre* point by *Douglas Hogg K.C.*, suspension by *Lord Cozens-Hardy K.C.*, and anticipatory breach by *Langdon K.C.*

[RUSSELL J. As if it was a question of frustration of contract between two British subjects.]

Yes. And further it must be assumed there has been no anticipatory breach. On these two assumptions—where frustration occurs by reason of the law intervening and producing a legal impossibility, the legal result may be expressed in either of two ways: each party may plead a discharge by law—

1. On the principle lex non cogit ad impossibilia; or

2. On the ground that it was an implied term of the contract that performance of it should continue to be lawful. Both views appear in the early decisions. The authorities treat legal impossibility, in one view, as resting on an implied term of the contract, and the doctrine of frustration proper rests on the same basis. Where the illegality or legal impediment to performance affects the contract, not directly but only indirectly, it may often be impossible to say the contract as a whole has become illegal and that the parties are therefore discharged by the principle lex non cogit ad impossibilia; in such cases it is generally by reason of an implied term that the contract is dissolved.

3. When a contract is frustrated, (*a*) it is dissolved, and not merely suspended, (*b*) it is dissolved automatically without any notice to, or election by, the parties. It is dissolved, because it contains an implied term that on the happening of the sort of events which cause the frustration it shall be dissolved—it comes to an end automatically in accordance with its terms by virtue of the parties' own agreement, and not by reason of external facts. That is the essence of the doctrine of frustration. The Court does not dissolve the contract; it merely says that according to its tenor the contract is dissolved. The sort of term to be implied is, broadly, this: the parties say, We contract with a view to the continued existence of the business circumstances now existing, freedom of intercourse between our respective countries, freedom of trade, control of our own affairs, continuance of legality of source of supply, and so on. If there is an interference with the continued existence of that

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broad business state of affairs to an extent beyond what could have been reasonably contemplated by the parties, the contract is dissolved.

4. The test by which to determine whether the contract is frustrated is whether there is such an implied term.

5. To answer that question, (*a*) the Court must put itself in the position of the parties when they made the contract, (*b*) the contract must be interpreted in the light of surrounding circumstances then known to the parties, (*c*) the implied term must be not inconsistent with any express terms.

6. The question which is to be put as a test is not whether there is any term in the contract to be implied relating to the particular events which have since happened, but is whether there is a clause implied in the contract for a continuance of the foundation of the contract inconsistent with the sort of events which have happened. It is important to bear that distinction in mind. The implied term, having ex hypothesi reference to the future, must necessarily be general in its provisions, except in certain excepted cases, such as, for instance, the continued existence of a specific thing.

7. The element of time must very much enter into the consideration of the question. If a contract, by express or implied terms, provides for continuous performance, interruption from outside may last so long as to make the contract essentially different after the interruption, and to make it a new contract if enforced. That being a question of degree, the implied condition would be something to the effect that there should be a reasonable degree of continuity of performance.

8. Certainty in business being vital, and uncertainty a thing which reasonable business men seek to avoid, the Court, in considering what implied term is to be read into the contract, will assume that the parties (if they thought about it) would mean to know where they stood while the contract lasted, and not mean to be bound if events happened which made the future an absolute fog.

To sum up the conclusion to be arrived at from the above propositions, it is this, that as regards all the contracts in issue (and apart from minor details), the basis of them all, in the agreement of the parties and as contemplated by the parties, was 1. that they provided for performance within a fixed time, comparatively short, subject to minor postponements from specified causes; 2. that the source of supply in all cases was known to all parties, and intended by both parties, to be Germany; 3. that the contracts were made under an international régime of free trade, in which the sellers were free to get what they wanted from Germany and under unrestricted importation into the United Kingdom; 4. that the sellers were in free control of their business and masters of their own actions; 5. that the performance of the contracts was intended to be continuous, subject to minor interruptions; 6. that, instead of that basis subsisting, it has been completely taken away by the entire change of trade conditions and by all the facts proved; 7. that the mere interruption in time (by itself and without anything else) and each one of the various points submitted above (by itself without the others) was so fundamental that an alteration to the degree which has happened in regard to any one of them would have been sufficient, on the authority of the decisions, to constitute frustration of those contracts.

Secondly, none of the suspension clauses can be interpreted as covering war between England and Germany, and, if in any case there is a clause which can be so interpreted, it cannot, for the reasons given in the decisions, be given effect to, because to give effect to it would be to make it illegal and invalid.

Thirdly, if there be a legal suspension during the whole war, that term goes beyond anything implied in the contract and disappears with the contract: *Ertel Bieber & Co.* v. *Rio Tinto Co.* (1)

[They referred to: *Furtado* v. *Rogers* (2); *Taylor* v. *Caldwell* (3); *Baily* v. *De Crespigny* (4); *Jackson* v. *Union*

(1) [1918] A. C. 260.
(2) (1802) 3 Bos. & P. 191, 200.
(3) (1863) 3 B. & S. 826.
(4) (1869) L. R. 4 Q. B. 180, 185.

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Marine Insurance Co. (1); *Bush* v. *Whitehaven Trustees* (2); *Krell* v. *Henry.* (3) Post-war decisions: *Zinc Corporation* v. *Hirsch* (4); *Distington Hematite Iron Co.* v. *Possehl & Co.* (5); *Horlock* v. *Beal* (6); *Tamplin Steamship Co.* v. *Anglo-Mexican Petroleum Products Co.* (7); *Metropolitan Water Board* v. *Dick, Kerr & Co.* (8); *Anglo-Northern Trading Co.* v. *Emlyn Jones & Williams* (9); *Clapham Steamship Co.* v. *Handels-en-Transport-Maatschappij Vulcaan* (10); *Veithardt & Hall* v. *Rylands Brothers* (11); *E. Hulton & Co.* v. *Chadwick & Taylor* (12); *Naylor, Benzon & Co.* v. *Krainische Industrie Gesellschaft* (13); *Blackburn Bobbin Co.* v. *Allen & Sons* (14); *Bank Line* v. *Capel & Co.* (15); *Woodfield Steam Shipping Co.* v. *Thompson & Sons* (16); *Pacific Phosphate Co.* v. *Empire Transport Co.* (17); *Orient Steam Navigation Co.* v. *Naval Colliery Co.* (18); *Andrew Millar & Co.* v. *Taylor & Co.* (19)

Cyril Atkinson K.C., Owen Thompson K.C. and *Dollar* for the Bayer Co. and *Cyril Atkinson K.C.* and *Devonshire* for Griesheim Elektron. The aspect of the case which falls to be argued on behalf of this controller is set out in the pleadings thus: "1. The contract was dissolved upon the outbreak of war . . . . (*c*) because the parties contracted on the footing that the goods to be supplied would come from Germany only," and "(*d*) because the continued existence or further performance of the contract would involve intercourse with the enemy or would in any event tend to assist the enemy." This argument on illegality proceeds on

(1) (1874) L. R. 10 C. P. 125, 143–6.
(2) (1888) 2 Hudson's Building Contracts, 4th ed., 122, 130–1.
(3) [1903] 2 K. B. 740.
(4) [1916] 1 K. B. 541, 553, 554, 556, 557, 563.
(5) [1916] 1 K. B. 811, 812, 814.
(6) [1916] 1 A. C. 486, 492, 494.
(7) [1916] 2 A. C. 397, 398, 399, 403, 406, 418, 422.
(8) [1917] 2 K. B. 1, 28, 35. On appeal [1918] A. C. 119, 126, 131.
(9) [1917] 2 K. B. 78, 83.
(10) [1917] 2 K. B. 639, 645-6.
(11) 116 L. T. 706, 708, 709, 711; 86 L. J. (Ch.) 604, 609.
(12) 34 Times L. R. 230.
(13) [1918] 1 K. B. 331.
(14) [1918] 1 K. B. 540. On appeal [1918] 2 K. B. 467.
(15) [1919] A. C. 435, 440, 442, 448 et seq.
(16) (1919) 36 Times L. R. 43.
(17) (1920) 36 Times L. R. 750.
(18) (1916) Shipping Gazette, March 8, 10.
(19) [1916] 1 K. B. 402.

the two assumptions, 1. that the contracts were between British companies, and 2. that they provided in terms for the delivery of German goods, or that both parties knew the goods were to come from Germany. The essential difference between frustration and illegality is that the former depends on an implied term in the contract and the latter does not and cannot. Contracts with an alien enemy (which is the simple case, but the principles apply equally to contracts between British subjects) have been declared void on the ground of public policy for the reason either 1. that performance would involve intercourse with the enemy, or 2. that recognition of the contract might confer an immediate, or the prospect of future, benefit on the enemy. (If the law demands the dissolution of a contract on the ground of public policy it is not open to the parties to defeat that policy by any suspension clause.) It has been so often said that one of the reasons for declaring contracts void as against public policy is that they involve intercourse with the enemy, that it is needless to cite authorities for that proposition. The test of illegality from that point of view is not whether the contract is with an alien enemy—there is no magic in its being made with an alien enemy—but whether performance of the contract between whomsoever it is made involves intercourse with the enemy, and if it does it is void on grounds of public policy. But cases may be referred to in support of the second proposition—namely, that contracts may be void on the ground of public policy because, though not involving intercourse with the enemy, they may confer an immediate benefit or a prospect of future benefit on the enemy.

[They referred to *Zinc Corporation* v. *Hirsch* (1); *Clapham Steamship Co.* v. *Handels-en-Transport-Maatschappij Vulcaan* (2); *Naylor, Benzon & Co.* v. *Krainische Industrie Gesellschaft* (3); *Ertel Bieber & Co.* v. *Rio Tinto Co.* (4); *Andrew Millar & Co.* v. *Taylor & Co.* (5); *Veithardt & Hall*

(1) [1916] 1 K. B. 541, 556, 557.
(2) [1917] 2 K. B. 639, 644.
(3) [1918] 1 K. B. 331, 341, 343, 345.
(4) [1918] A. C. 260, 270, 273, 275, 286, 290.
(5) [1916] 1 K. B. 402, 414.

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v. *Rylands Brothers* (1); *Gadd* v. *Houghton* (2); *Brandt & Co.* v. *Morris & Co.* (3)]

Douglas Hogg K.C., *Austen-Cartmell* and *Gavin Simonds* for Meister Lucius & Bruning. On the Continental Tyre point, the net result of the authorities is that, as Lord Parker said in *Daimler Co.* v. *Continental Tyre and Rubber Co.* (4), in order to decide whether or not a company has enemy character for the purpose of testing its relations with British subjects, the deciding test is the question of control, the answer to the question being arrived at in the same sort of way as the answer to the same test is arrived at in the income tax cases. That view of Lord Parker has been expressly adopted by a series of judges, especially by the late Lord Cozens-Hardy M.R. in *In re Hilckes.* (5) That is, therefore, now the true test. In determining whether or not the contracts have been avoided by the war, the Court has to consider where at the outbreak of war the control of each of the companies was. If the contracts were avoided at the outbreak of war, the fact that at some subsequent date the control became English could not revive them. When there is war—a political state of uncertain duration and presumed to last for a long time—it is essential to be able to say at the outbreak of war what is the effect on the contract; there cannot be an intermediate period during which the contract is neither alive nor dead. If at the outbreak of war the place from which each of these companies was controlled was Germany, the contract is at an end; if not, it is still alive. If at the outbreak of war the control was from Germany, then, to test whether or not the contract remained in force after the outbreak of war, the company has to be treated as having an enemy character. Then, having regard to a series of cases, of which *Ertel Bieber & Co.* v. *Rio Tinto Co.* (6) is the most recent illustration, it does not matter whether or not there was a suspensory clause

(1) 116 L. T. 706, 709; 86 L. J. (Ch.) 604.
(2) (1876) 1 Ex. D. 357.
(3) [1917] 2 K. B. 784.
(4) [1916] 2 A. C. 307.
(5) [1917] 1 K. B. 48.
(6) [1918] A. C. 260.

at all—whether there was a suspensory clause suspending the whole operation of the contract, or a suspensory clause merely suspending the deliveries under the contract—because there is a contract between some one having an enemy character and a British subject and that contract was determined ipso facto when the war broke out.

[They referred also to *The St. Tudno* (1); *The Noordam* (*No.* 2) (2); *The Vesta* (3); *The Hamborn* (4); *Clapham Steamship Co.* v. *Handels-en-Transport-Maatschappij Vulcaan* (5); *Continho Caro & Co.* v. *Vermont & Co.* (6); *Naylor, Benzon & Co.* v. *Krainische Industrie Gesellschaft* (7); *Hood & Co.* v. *Magee.* (8)

Lord Cozens-Hardy K.C. and *Robert Peel* for the Badische Co. *Ertel Bieber & Co.* v. *Rio Tinto Co.* (9) lays down that, if there is a suspensory clause which applies to war between this country and Germany, the clause is illegal so far as suspension arising on the war is concerned, and has no effect. It has been held that "war" in clauses not dissimilar to the present does not mean war between the countries of the contracting parties, as here the war between England and Germany, and that, if it did, the clause would be invalid. If these companies are of enemy character or if there has been frustration, the suspension clause does not apply. If the contracts are between British subjects and they are not frustrated, and the suspension clause operates, the claims are premature, and no right to damages accrued at the date when these proceedings commenced. The crux, if the suspension clause operates, is whether there has been any anticipatory breach.

Langdon K.C. and *H. C. Davenport* for Kalle & Co. There has been no breach of contract, anticipatory or otherwise, by reason of the winding up order under the Act of 1916. The sale of the assets was the logical consequence of the order. The order was not an act inter partes or an act of a person who stood in immediate relation by way of contract (or

(1) [1916] P. 291.
(2) [1919] P. 255.
(3) [1920] P. 385.
(4) [1919] A. C. 993.
(5) [1917] 2 K. B. 639.
(6) [1917] 2 K. B. 587.
(7) [1918] 1 K. B. 331.
(8) [1918] 2 I. R. 34.
(9) [1918] A. C. 260.

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otherwise) to the company, but it was an act of State determining the legal existence of the person against whom the order was operative or, in the case of a company, determining that company, subject to the limitations and restrictions appearing in the order. The order was an order of Court, but was made pursuant to a direction of a department of the Government, and therefore was an order made pursuant to an act of State. It became operative therefore without any act or application of the parties. It was made in the interests and for the benefit of the State. It severs the relations of the contracting parties with the subject of the order by, as it were, the stroke of a guillotine, but leaves the contracting parties to whatever remedies may be left to them outside the order. It ends the trading capacity of the company, its business, once and for all. To say that the making of an order of that kind creates an anticipatory breach for which the company can be made responsible is contrary to a well-known proposition of law: where an act of State brings the business of a company to an end and prohibits the further carrying on of the business, that is an overriding act, and the parties are not liable for the consequences of that overriding act in being unable to complete their contracts. The company is put in a position in invitum and commits no breach. It is not analogous to an order for the compulsory (or voluntary) winding up of a company or to an order in bankruptcy, because there it has been the voluntary acts or dealings of the company or individual which have enabled the Court to have jurisdiction in the matter, but here the company has not brought the order upon itself. The company here is tainted—is a plague spot, to use a phrase of Younger J.

Secondly, under sub-s. 3 of s. 1 of the Act of 1916, debts and liabilities do not or may not include future claims, or anything except a money claim presently due. The subsection does not contemplate an action for damages such as the present claims really are. There is no legal claim under sub-s. 3. But this is really a point for the Attorney-General to deal with as indicating the view of the Board of Trade

on the scope of the Trading with the Enemy Acts as a whole.

[RUSSELL J. This point has not been suggested before. If it had been it should have been the first to be determined, and it would have been the controllers' duty to raise it at the earliest possible moment—a pure point of law.]

[They referred to *In re Hagelberg Aktien-Gesellschaft* (1); *In re Kastner & Co.* (2); *Holt* v. *A. E. G. Electric Co.* (3); *In re Dieckmann* (4); *In re Hugo Stinnes, Weigall's Claim.* (5)]

R. A. Wright K.C. and *Neilson K.C.* for the Bradford Dyers' Association, Ld. The principles in regard to frustration cannot be applied in the broad form in which they have been stated by Mr. Leslie Scott on behalf of the controllers, but must be limited and be subject to certain necessary qualifications and conditions. If they were applied without qualification, the result would be to put an end entirely to contractual responsibility, and to introduce such uncertainty into the whole law of contracts as to make every contract impossible to rely on, or to apply. Certainty is essential in business; and one of the first things in business is that a contract shall be fulfilled according to its letter and terms, unless, on the ground of the clearest implication, other terms have to be read in as a matter of law or custom or implied term. The true principle is that the doctrine of frustration of contracts, as it is called, is not applicable to contracts for the sale of unascertained goods. Illegality or principles of that nature are the only matters which qualify or interfere with the general obligation of a vendor to deliver, and of the buyer to accept delivery of, goods arising under a contract for the sale of unascertained goods. The expression "frustration of contract" is often and conveniently used, and has become familiar, but it is not correct. A contract is dissolved or rescinded. It is an adventure which is frustrated. The expression "frustration of contract" has come by a sort of adoption from the leading case of *Jackson* v.

(1) [1916] 2 Ch. 503.
(2) [1917] 1 Ch. 390.
(3) [1918] 1 Ch. 320.
(4) Ibid. 331.
(5) Unreported, February 24, 1919.

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Union Marine Insurance Co. (1), where the expression "frustration of adventure" is properly used. Lord Sumner in *Bank Line* v. *Capel & Co.* (2) refers to the doctrine of frustration of the adventure as commencing with *Poussard* v. *Spiers.* (3) That class of case, in connection with which "frustration" is properly used, falls under the head in the civil law referred to in *Krell* v. *Henry* (4) and *Nickoll & Knight* v. *Ashton, Edridge & Co.* (5) as the class of obligatio de certo corpore, to which the maxim "Lex non cogit ad impossibilia" applies. Those are cases of frustration of adventure in the strict sense, carrying with it the consequence of dissolution of the contract. Another class of cases in which a party who has made a contract absolute in terms is held to be absolved from obligation to perform it, and the contract is held to be dissolved, is where the contract provides for something which at the date of the contract is lawful by the law to which the contractor is subject, but which afterwards and before the time of performance becomes unlawful, on the principle of *Baily* v. *De Crespigny.* (6) If there be any third class of cases to which the principle of frustration—or more correctly dissolution of the contract—can be applied, it is a class where the principle must be very reluctantly and sparingly applied by the Court, because it involves implying a condition or adding to the contract which the parties have not thought fit to express. That is the class of cases dealing with contracts for sale of unascertained goods. The position of a buyer and seller in a commercial contract for unascertained goods is that, apart from express exceptions and apart from the interference of the law of the country, the seller assumes the obligation of delivering certain goods according to the contract; and the buyer obtains the right of having those goods delivered to him according to the contract and subject to the express terms of the contract, and, if he does not get the goods delivered to him, he has the right to claim damages: *In re Comptoir Commercial*

(1) L. R. 10 C. P. 125.
(2) [1919] A. C. 435.
(3) (1876) 1 Q. B. D. 410.
(4) [1903] 2 K. B. 740.
(5) [1901] 2 K. B. 126.
(6) L. R. 4 Q. B. 180.

Anversois & Power, Son & Co. (1); *Jacobs, Marcus & Co.* v. *Crédit Lyonnais* (2); *Dynamit Actien-gesellschaft* v. *Rio Tinto Co.* (3); *Ashmore & Son* v. *Cox & Co.* (4); *Taylor* v. *Caldwell* (5); *Howell* v. *Coupland* (6); *Nickoll & Knight* v. *Ashton, Edridge & Co.* (7); *Tennants, Ld.* v. *Wilson & Co.* (8); *Blackburn Bobbin Co.* v. *Allen & Sons* (9); *Lebeaupin* v. *Crispin & Co.* (10); *Thornett & Fehr* v. *Yuills* (11); *Herne Bay Steam Boat Co.* v. *Hutton.* (12) The only two exceptions that can be suggested to that line of authority are *Veithardt & Hall* v. *Rylands Brothers* (13), *E. Hulton & Co.* v. *Chadwick & Taylor*, (14), but those two cases are distinguishable; the first was clearly a case where the contract by its express terms involved intercourse with the enemy, and the second was a case where the fulfilment of the contract according to its terms was prevented by administrative interference, involving illegality of the type of *Baily* v. *De Crespigny.* (15) In the present cases there is no room for any such implied term as is contended for on behalf of the controllers. The fact that a contract is made in time of peace does not involve the implication of a term that the continuance of peace is to be a condition of the continuance of the contract—apart from any question of illegality or intercourse with the enemy.

The suspension clauses included suspension in the event of war, and were understood to be operating after the outbreak of war, and it was understood that when stocks were exhausted there would be no further supplies till the cessation of the war. That was the position up to the time when the controllers closed down the businesses and determined the contracts. The controllers' action constituted an anticipatory

(1) [1920] 1 K. B. 868.
(2) (1884) 12 Q. B. D. 589.
(3) [1918] A. C. 260, 294.
(4) [1899] 1 Q. B. 436.
(5) 3 B. & S. 826.
(6) (1876) 1 Q. B. D. 258.
(7) [1901] 2 K. B. 126.
8) [1917] A. C. 495.
(9) [1918] 1 K. B. 540. On appeal [1918] 2 K. B. 467.
(10) [1920] 2 K. B. 714.
(11) 37 Times L. R. 31.
(12) [1903] 2 K. B. 683.
(13) 116 L. T. 706; 86 L. J. (Ch.) 604.
(14) 34 Times L. R. 230; 35 Times L. R. 620.
(15) L. R. 4 Q. B. 180.

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breach, and, there having been up to that time no dissolution of the contracts on any ground of failure of implied condition, the anticipatory breach operated to give then and there claims for damages which were unaffected by anything that might subsequently happen, the cause of action having accrued when the breach was complete.

Merriman K.C. and *Pattisson* for the United Turkey Red Co., Ld. A fallacy of the argument addressed to the Court by counsel for the controllers lies in their failure to distinguish between the fact that goods of the character in question, the subject-matter of the contracts, are generally manufactured in Germany and the fact that it was not necessary, in the contemplation of the parties, that the particular goods to satisfy the particular contract should come from Germany at all. These contracts did not necessarily, within the contemplation of the parties, fall to be implemented from Germany; they fell primarily to be implemented from stocks in this country.

Taylor v. *Caldwell* (1) and *Howell* v. *Coupland* (2) (which was not cited by the other side) were decided on the ground that they were dealing with specific and not unascertained goods and if they had been dealing with unascertained goods they would have been decided the other way. *Veithardt & Hall* v. *Rylands Brothers* (3) which is the only case of unascertained goods which is cited against the claimants, and which at first sight appears formidable, is distinguishable toto cœlo, because there the contract would have to be fulfilled by specifications made to Veithardt & Hall in this country and passed on to a German company. The distinction between specific and unascertained goods was present to the minds of Blackburn J. in *Taylor* v. *Caldwell* (1), of Coleridge C.J. in *Howell* v. *Coupland* (2), of Lord Russell C.J. in *Ashmore & Son* v. *Cox & Co.* (4) and of Pickford L.J. in *Blackburn Bobbin Co.* v. *Allen & Sons.* (5)

As to the point on the suspension clauses—it is said on

(1) 3 B. & S. 826.
(2) 1 Q. B. D. 258.
(3) 116 L. T. 706; 86 L. J. (Ch.) 604.
(4) [1899] 1 Q. B. 436.
(5) [1918] 2 K. B. 467.

the other side that these suspension clauses do not in fact operate, because they do not relate to a war between England and Germany. That idea emerged in cases in which the contract, as is now known, was really dissolved by the fact that it was made with the subject of an enemy state: *Ertel Bieber & Co.* v. *Rio Tinto Co.* (1) The suggestion of the suspensory clause not applying to this war was thrown out at a time when the Courts were groping for the right principle. The other side have cited a number of cases to show that, in spite of a suspension clause, frustration has nevertheless been held to apply. But the result of an examination of the cases is that that cannot be truly said of any contract between British contracting parties in which a suspension clause, directly referring in terms to war, is present.

[They referred to *Zinc Corporation* v. *Hirsch* (2); *Distington Hematite Iron Co.* v. *Possehl & Co.* (3); *Clapham Steamship Co.* v. *Handels-en-Transport-Maatschappij Vulcaan* (4); *Naylor, Benzon & Co.* v. *Krainische Industrie Gesellschaft* (5); *Pacific Phosphate Co.* v. *Empire Transport Co.* (6); *Orient Steam Navigation Co.* v. *Naval Colliery Co.* (7); *Bank Line* v. *Capel & Co.* (8); *Metropolitan Water Board* v. *Dick, Kerr & Co.* (9); *Tennants, Ld.* v. *Wilson & Co.* (10)]

On the question of anticipatory breach—the controller has repudiated the contracts and the repudiation was accepted. The other side seem to contend only that the winding-up order did not constitute a breach; they did not say that acts done under the order might not be a breach. The controller is put in a position analogous to that of a liquidator or official receiver or trustee in bankruptcy. From the date of the controllership order he is the only person who can act, and, when he in fact sells the assets, it is the company selling the assets and thereby putting it out of its power

(1) [1918] A. C. 260.
(2) [1916] 1 K. B. 541.
(3) [1916] 1 K. B. 811.
(4) [1917] 2 K. B. 639.
(5) [1918] 1 K. B. 331.
(6) 36 Times L. R. 750.
(7) (1916) Shipping Gazette, March 8, 10.
(8) [1919] A. C. 435.
(9) [1918] A. C. 119.
(10) [1917] A. C. 495.

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even to fulfil the contract. The sale of the assets and other acts of the controller done under the order are not, as the other side contend they are, the actions of the executive. The controller represents the company, and his acts are the acts of the company acting through him. The appointment of the controller and his acts under his appointment operate as a cancellation of the contract.

[They referred to *In re Hugo Stinnes, Weigall's Claim* (1); Board of Trade circular of instructions to Controllers, Trading with the Enemy Amendment Act, 1916, s. 1, sub-s. 2; s. 2.]

Clauson K.C., Gover K.C. and *Ashworth James* for the Calico Printers Association, Ld., the Indigo Buying Amalgamation, the British Cotton and Wool Dyers' Association, Ld., F. Scott & Co., Ld., and Thomas Welch's executors. The actual decision in *Daimler Co.* v. *Continental Tyre and Rubber Co.* (2) was only that the secretary of the respondent company, who had given instructions for the issue of a writ in the company's name, had no authority to give any such instructions, and on that ground the action could not be sustained. But there are principles of law laid down in the judgments, particularly in that of Lord Parker, which apply to the present cases. Those principles amount to this—that, whereas an alien enemy in the strict sense of the word is under certain disabilities, there are certain bodies, which for convenience may be called enemy controlled companies, which are to be taken to be under the same liabilities as alien enemies in the strict sense. But there is not in that case (nor in any other case) a trace in any shape or form of the plea which the controllers set up here that the character of alien enemy entails, not the disabilities pointed out in that case, but certain privileges—namely, the privilege of being by that character, freed from obligations which would otherwise be incumbent. Alien character confers disability, not privilege. There is no authority to be found in the books for the proposition that the law of England recognizes in any shape or form alien character as conferring privilege.

After the outbreak of war an alien enemy can be sued:

(1) Unreported, Feb. 24, 1919. (2) [1916] 2 A. C. 307.

Porter v. *Freudenberg*. (1) As to the question whether he can, in answer to a claim for breach of contract, set up that there has been an outbreak of war—outbreak of war does not by itself put an end to the contract, but does dissolve a contract between one of His Majesty's subjects and an alien enemy if the continuance of the contractual link necessarily involves forbidden communication with an alien enemy. A passage in the judgment of Lord Dunedin in *Ertel Bieber & Co.* v. *Rio Tinto Co.* (2) is sufficient authority to show that a good deal more than the outbreak of war is required to affect a contract between a subject and an alien enemy. The same proposition is implied, if less conveniently stated, in *Zinc Corporation* v. *Hirsch*. (3) Assume in England before the war a company which, and the business of which, and the person managing the business of which, were under alien control—at 11 P.M. on August 4, 1914, that control ceased to be legal, and to operate, but the delegation of powers to the representative in England of the company remained, unfettered by any possibility of legal alien enemy interference: *Daimler Co.* v. *Continental Tyre and Rubber Co.* (4) It is lawful for a British subject to continue after outbreak of war communications and relations with a person in England who was before outbreak of war the authorized agent of an alien principal but whose principal, in time of peace an alien friend, has become an alien enemy: *Tingley* v. *Müller* (5); *Continho Caro & Co.* v. *Vermont & Co.* (6) If the enemy character of a person or body is to be deduced from the fact of foreign control, the moment when the foreign control ceases to operate—namely, on outbreak of war—the enemy character no longer attaches. In the case of each of these companies there were persons who had before the war authority to carry on the business of the company in England. The claimants in continuing to deal with those persons, who were carrying on in England the business of what the

(1) [1915] 1 K. B. 857.
(2) [1918] A. C. 260, 269.
(3) [1916] 1 K. B. 541.
(4) [1916] 2 A. C. 307, 325, 330, 336.
(5) [1917] 2 Ch. 144.
(6) [1917] 2 K. B. 587.

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claimants were entitled to assume was an English company, were committing no offence nor trading with the enemy: Trading with the Enemy Proclamation No. 2 (September 9, 1914); Trading with the Enemy Act, 1914, s. 1, sub-s. 2; *The St. Tudno* (1); *The Noordam* (*No.* 2) (2); *The Vesta* (3); *The Hamborn* (4); *Clapham Steamship Co.* v. *Handels-en-Transport-Maatschappij Vulcaan* (5); *In re Hilckes.* (6) The claimants are entitled to treat these companies as having no privilege by reason of their enemy taint. The controllers say or imply that they are in a special position in regard to the contracts, because they cannot or could not be carried out without trading with the enemy. That contention is not supported by the evidence.

The controllers, representing a quasi-enemy, cannot set up that the claimants, who are seeking to maintain the contracts, are really trying to maintain something which is a fetter on them (the claimants) as British traders and which for that reason is contrary to public policy as tying up the resources of this country, and that the continuance of the contracts is therefore illegal. That is a plea which might be set up by a British trader against whom a contract was being sought to be enforced, but the alien enemy cannot set up that it would be contrary to public policy to enforce the contract because to enforce it would be to tie the British trader.

On the question of anticipatory breach—the suggestion on behalf of the controllers is that the appointment of the controller, plus the action taken by him in winding up and putting an end to the business of the company, operates as an act of State and, being an intervention of a higher power, is not a breach or repudiation by the company of the contract. The argument seems to be that, if the company had gone into voluntary liquidation at the date when the controller was appointed, or into compulsory liquidation, and the assets had been realized, that would have been a repudiation of the contract; but it is contended that the circumstances

(1) [1916] P. 291.
(2) [1919] P. 255.
(3) [1920] P. 385.
(4) [1919] A. C. 993.
(5) [1917] 2 K. B. 639.
(6) [1917] 1 K. B. 48.

of a controllership are different, and that something has been done and the assets dealt with against the will of the company. The answer to that argument is that the question simply depends on what the Trading with the Enemy Acts enact. The effect of them is that under certain circumstances a modified form of liquidator, so to speak, is to take possession of the company's assets, and deal with them on lines and with powers borrowed from the provisions laid down in the Companies Acts where a liquidator is imposed on a company by the Court. But the acts of this modified form of liquidator—namely, of the controller—are no more acts of State than are the acts of a liquidator appointed by the Court in a compulsory winding up or by the company in a voluntary winding up: Trading with the Enemy Amendment Act, 1916, s. 1, sub-s. 2, and s. 2; Board of Trade Circular Letter of Instructions to Controllers.

Cyril Atkinson K.C. in reply. Sect. 2 of the Trading with the Enemy Amendment Act, 1916, and the Board of Trade Memorandum for the guidance of Controllers, both presuppose that the winding-up order has not affected the contracts. If the winding-up order was a repudiation of all contracts, there would be no contracts left for the Board of Trade to make an order in respect of under s. 2.

If there has been an anticipatory breach, accepted by the claimants as putting an end to the contracts, damages can only be claimed and assessed as at the date of that acceptance and the claimants cannot rely on anything happening subsequently to affect damages. But in reality there have been no sales or dealings amounting to a breach.

The contracts were for the sale of German goods. Both parties knew that the goods contracted to be sold were to be obtained from works in Germany. The present case is within *Veithardt & Hall* v. *Rylands Brothers.* (1) Mere knowledge that the goods were to come from Germany is sufficient to invalidate the contracts, though by the terms of the contracts there might be nothing absolutely binding the sellers to get the goods from Germany.

(1) 116 L. T. 706; 86 L. J. (Ch.) 604.

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The other side do not appear to suggest that, as to illegality of performance, it matters whether the contract is for ascertained or for unascertained goods. They suggested it rather as to frustration, and relied on a passage in *Blackburn Bobbin Co.* v. *Allen & Sons* (1), where *Nickoll & Knight* v. *Ashton, Edridge & Co.* (2) is cited by McCardie J. as authority for a proposition. That passage should read: "fourthly, where a specific set of facts collaterally only affecting a" (omitting the word "specific" which is a slip) "subject matter, but yet constituting the basis of contract, has ceased to exist."

There is a fallacy in the argument of the other side on the *Continental Tyre* point: they say, Assume that at the outbreak of war one of these companies was entirely German and came within everything Lord Parker said, yet when once war broke out the German control could be no longer exercised. The fallacy is that there could be, or was, any change in the control of the company.

Johnson v. *Raylton, Dixon & Co.* (3) lays down the proposition that, on a sale of goods by a manufacturer of such goods, there is an implied condition that the goods are of his own manufacture, though the contract may not say so. If the Court takes the view that the present cases are parallel with the case of a manufacturer selling his own goods, it may think that principle may apply.

Douglas Hogg K.C. in reply. Mr. Clauson says that an alien cannot have privilege, and cites *Porter* v. *Freudenberg* (4), which says that an enemy cannot sue but can be sued. In so arguing there is confusion of thought. It is true that an alien enemy cannot sue but can be sued: *Porter* v. *Freudenberg* (4). The *Continental Tyre Case* (5) dealt with the question who were alien enemies. But it is not true that the question which the Court has now to decide has nothing to do with disability. The results of being an alien enemy are that he cannot sue and that certain executory contracts are dissolved. The present cases rest, not on

(1) [1918] 1 K. B. 540, 548.
(2) [1901] 2 K. B. 126.
(3) (1881) 7 Q. B. D. 438.
(4) [1915] 1 K. B. 857.
(5) [1916] 2 A. C. 307.

personal disability to sue in contract, but on whether the contracts are dissolved. There are two steps in the *Continental Tyre* point, one whether these contracts, if made with an alien enemy, are dissolved, the other whether these companies are enemies. The *Continental Tyre Case* (1) is relevant only on the second step. If these contracts, if made with enemies, are not dissolved, the *Continental Tyre Case* (1) is of no use. If, on the other hand, these contracts, if made with enemies, are dissolved, the *Continental Tyre Case* (1) is essential. For the claimants to say "You are an enemy and cannot sue us" is no help to them. This is not an enemy case where the question of disability to sue arises at all. The controllers' case is that, because of enemy character, the contracts were dissolved; and the question is, Are the contracts within the dicta as to dissolution at the outbreak of war?

Then Mr. Clauson says there was no enemy control, because the companies, not being enemies but agents of German companies, could not after the outbreak of war legally communicate with the German boards. The answer is that that argument is contrary to the facts and to the basis of the *Continental Tyre Case.* (1) Whether enemy character exists or not depends, as in income tax cases, on where the residence—namely, the brains and controlling power—is: if the brains and controlling power are in Germany, the enemy character exists; if the brains and controlling power are in England, it does not. Here, before the war, the place of brains and control (i.e., residence of company) was Germany; the outbreak of war does not change that residence. It is true that a company can change its residence, as was done in the case of Meister Lucius and Bruning through Sir W. Plender by an order of October, 1914. The outbreak of war dissolved these contracts automatically, although an enemy agent might be able to deal with—namely, sell—the property, as Mr. Clauson says *Tingley* v. *Müller* (2) decides he can. Mr. Clauson says, too, that a branch of an enemy company may, under the proclamations, trade in this country,

(1) [1916] 2 A. C. 307. (2) [1917] 2 Ch. 144.

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and so, if these companies are branches, the contracts are not dissolved, for the agents can deal with the assets. If Mr. Clauson is right, that is an end of this case. But the Court of Appeal in *Wolf & Sons* v. *Carr, Parker & Co.* (1) decided the exact contrary—the decision was that a pre-war contract, made by an agent of an enemy, was dissolved by the outbreak of war and could not be insisted on. That supports the proposition now being advanced. It disposes of Mr. Clauson's argument that the English agents could fulfil the contracts. The contracts were, on the decision of *Wolf & Sons* v. *Carr, Parker & Co.* (1), dissolved. The same was said in *Kreglinger & Co.* v. *Cohen.* (2)

It is a fallacy of Mr. Clauson to say that, because alienage is not a privilege but a disability, therefore everything—e.g., any contract—to the disadvantage of the alien is kept alive. It is not a true proposition. Alienage, while not giving a privilege of immunity from legal process, does not prevent the alien from asserting the dissolution of a contract which has, apart from any point of view of private advantage to the enemy or the Englishman, but on the ground that public policy says the contract is contrary to public welfare, been dissolved. Whether it has been dissolved depends on the state of affairs at the outbreak of war. There cannot be a suspensory period in which the contracts are neither alive nor dead. The contracts, if dissolved, were dissolved by outbreak of war. Thus the question is, Where was the company then resident? If in Germany, the contract is dissolved. The fact of agents in England continuing to carry on the agency, and to look after the property and perform their duties so far as they could, does not alter the fact of the company having residence only in Germany. The contracts once dissolved cannot be resuscitated; once gone, they are gone for all purposes. The test is whether at the outbreak of war one party is an enemy. Nothing in the *Continental Tyre Case* (3) is inconsistent with this view. *Tingley* v. *Müller* (4) only decided that, where there is real

(1) (1915) 31 Times L. R. 407.
(2) Ibid. 592.
(3) [1916] 2 A. C. 307.
(4) [1917] 2 Ch. 144.

property in this country belonging to a person who at the date of a contract for sale has become an alien enemy, his agent in this country may lawfully deal with, namely, sell, the property, though the proceeds will one day go to the enemy. It did not purport to decide that a person can go on trading on behalf of an enemy, nor did it nor could it, in view of other authorities, decide that the fact of an alien enemy having an agent in this country prevented the dissolution of a pre-war contract with that enemy. Lord Sumner expresses his view to that effect in *Rodriguez* v. *Speyer Brothers* (1), where he is referring to *Tingley* v. *Müller*. (2) The only other case in which *Tingley* v. *Müller* (2) is referred to is *Naylor, Benzon & Co.* v. *Krainische Industrie Gesellschaft* (3), but what McCardie J. says about an agent being able to deal with an enemy's property in England because it is not confiscated, and so long as he does not seek to communicate with the enemy, has no application to the question whether a pre-war contract with an enemy has on grounds of public policy been dissolved by outbreak of war. In *The St. Tudno* (4) Evans P., after citing the *Continental Tyre Case* (5), deals with the question of enemy character of a ship and says it is to be considered of enemy character because at the outbreak of war it was controlled by Germany, and it does not matter that after the outbreak the control was taken over by English directors, his view obviously being that the *Continental Tyre Case* (5) decided that the character at the outbreak was the crucial test.

The suggestion of the other side that the effect of the outbreak of war was not to dissolve the contract, but only to give the British party an option to dissolve it, does not fit in with *Kreglinger & Co.* v. *Cohen*. (6) If that suggestion were right, it would be turning the contract into an entirely different bargain under which the enemy would remain bound to deliver but the Englishman not bound to take the goods. It would overlook the true principle which is being

(1) [1919] A. C. 59, 128.
(2) [1917] 2 Ch. 144.
(3) [1918] 1 K. B. 331, 344.
(4) [1916] P. 291, 299.
(5) [1916] 2 A. C. 307.
(6) 31 Times L. R. 592.

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considered—namely, not whether a particular German or Englishman, party to the contract, is damnified or benefited, but whether it is in accordance with the public good that arrangements involving intercourse with the enemy should continue to exist. What Lord Sumner says in *Ertel Bieber & Co.* v. *Rio Tinto Co.* (1) is entirely in accord with that view.

Leslie Scott K.C. in reply. Before replying on frustration—apart from the Continental Tyre point and the character of the Berlin Aniline Co., whether enemy or not—these contracts were dissolved on the outbreak of war because, owing to the peculiar organisation of the business by the German parent company, all the commercial dealings of the Berlin company in this country were dealings for the benefit of enemies, and, therefore, illegal.

As to frustration—the main argument of the other side is that the doctrine of frustration, as applicable to commercial contracts, does not apply to a commercial contract which is for the sale of unascertained goods. That proposition is wrong. As a broad rule—the rule of absolute obligation—every promisor takes under his contract the risk of inability to carry it out from whatever cause. The doctrine of frustration may perhaps be regarded as an exception to that rule of absolute obligation. But in reality it is not an exception. The question is what both parties, when they made their contract, really agreed should be that contract. To find that out, the Court applies the ordinary means of construing a contract—it regards its express terms, looks at the surrounding circumstances in which it was entered into, its subject-matter, the meaning of the terms used and the knowledge of both parties when they made the contract. The Court thus arrives at what must be presumed to have been the intention of the parties as reasonable men. It is not an inquiry what de facto was their intention. If, then, there is to be found in the contract an implied term as the basis or foundation on which the parties have contemplated that the contract shall be carried out, the implied term is part of the contract, which there is an absolute obligation on

(1) [1918] A. C. 260, 286–8.

the promisor to carry out. If the event on which by agreement between the parties the contract is to be dissolved takes place, the contract is dissolved according to its tenor. Thus the exception is really no exception, but is consistent with the rule of absolute obligation. That principle is applicable irrespective of the subject-matter of the contract. It applies as well to the sale of unascertained, as to that of specific, goods. There is one underlying principle in all the decisions, and the differences between them are due, not to a difference of classes of cases, but to the variety of affairs which makes the same principle manifest itself in various forms.

[He referred to *Blackburn Bobbin Co.* v. *Allen & Sons* (1); *Thornett & Fehr* v. *Yuills*. (2)]

Lord Cozens-Hardy K.C. in reply. The benefit of the arguments on the questions of law which have been advanced in reply on behalf of the other controllers is invoked on behalf of the Badische Co.

Clauson K.C. in reply on cases newly cited. *Wolf & Sons* v. *Carr, Parker & Co.* (3) and *Kreglinger & Co.* v. *Cohen* (4) were cases decided early in the war, and, though there are in those cases statements that the outbreak of war dissolved the contracts in question, it would not be contended now, in view of later authorities, and in particular *Ertel Bieber & Co.* v. *Rio Tinto Co.* (5), that the fact that a party to the contract was an alien enemy was enough under all circumstances to put an end to the contract. The observations on behalf of the controllers on those two cases do not in any way touch the main part of the argument for the claimants.

Sir Gordon Hewart A.-G. and *Gavin Simonds* for the Board of Trade.

Cur. adv. vult.

July 28. RUSSELL J. [after stating the facts as set out above]. It is now necessary to turn to the *Continental Tyre Case*. (6) There a writ had been issued in the name of the

(1) [1918] 1 K. B. 540.
(2) 37 Times L. R. 31.
(3) 31 Times L. R. 407.
(4) 31 Times L. R. 592.
(5) [1918] A. C. 260.
(6) [1916] 2 A. C. 307.

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Continental Tyre and Rubber Co. (Great Britain), Ld., against the Daimler Co., Ld., claiming payment of a trade debt. The master gave leave to sign judgment and his decision was affirmed by the judge in chambers and the Court of Appeal. The Continental Tyre Co. was a company registered in England for the purpose of selling in England tyres made by a German concern in Germany. The German concern held the bulk of the shares. The holders of the remaining shares (save one) and all the directors were Germans resident in Germany. The moneys claimed were moneys due on three bills of exchange drawn by the Continental Tyre Co. and accepted by the Daimler Co. in payment of goods supplied before the outbreak of war. The writ was issued by the solicitors upon the instructions of the secretary. The actual decision upon the appeal to the House of Lords was that the secretary could not (in the absence of a special power which did not exist) authorize the institution of the action, that the directors being the King's enemies could not after the outbreak of war authorize the institution of the action, and that, accordingly, the action was instituted without the company's authority and must be dismissed. In the course of their speeches some of the learned Lords (and in particular Lord Parker) made observations expressed by Lord Parker to be for the guidance of the public on questions of trading with the enemy, which are material and relevant to the matters arising for decision here. In strictness no doubt they are dicta, but in fact they have been referred to in many subsequent cases as "decisions" by Courts ranging from Courts of first instance to the Judicial Committee of the Privy Council. Lord Parker's observations were concurred in by Lord Mersey, Lord Kinnear and Lord Sumner. They were certainly not disapproved of by Lord Halsbury. Lord Atkinson, I think, concurs so far as they show that the seat of control should determine the residence of the company. It will be seen that Lord Parker, while conceding that a corporation is a legal person distinct from its corporators, nevertheless indicates that the rule against trading with the enemy depends upon enemy character, and that the character

of the corporators is relevant to the character of the company. He points out that, so far as concerns a natural person, residence in an enemy country invests him with enemy character, and he asks, What in the case of a corporation is the analogue of residence in an enemy country? He discards the place of incorporation and says that the analogy is to be found in "control." At this point I will read Lord Parker's words (1): "My Lords, I think that the analogy is to be found in control, an idea which, if not very familiar in law, is of capital importance and is very well understood in commerce and finance. The acts of a company's organs, its directors, managers, secretary, and so forth, functioning within the scope of their authority, are the company's acts and may invest it definitively with enemy character. It seems to me that similarly the character of those who can make and unmake those officers, dictate their conduct mediately or immediately, prescribe their duties and call them to account, may also be material in a question of the enemy character of the company. If not definite and conclusive, it must at least be prima facie relevant, as raising a presumption that those who are purporting to act in the name of the company are, in fact, under the control of those whom it is their interest to satisfy. Certainly I have found no authority to the contrary. Such a view reconciles the positions of natural and artificial persons in this regard, and the opposite view leads to the paradoxical result that the King's enemies, who chance during war to constitute the entire body of corporators in a company registered in England, thereby pass out of the range of legal vision, and, instead, the corporation, which in itself is incapable of loyalty, or enmity, or residence, or of anything but bare existence in contemplation of law and registration under some system of law, takes their place for almost the most important of all purposes, that of being classed among the King's friends or among his foes in time of war. What is involved in the decision of the Court of Appeal is that, for all purposes to which the character and

(1) [1916] 2 A. C. 340, 344.

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not merely the rights and powers of an artificial person are material, the personalities of the natural persons, who are its corporators, are to be ignored. An impassable line is drawn between the one person and the others. When the law is concerned with the artificial person, it is to know nothing of the natural persons who constitute and control it. In questions of property and capacity, of acts done and rights acquired or liabilities assumed thereby, this may be always true. Certainly it is so for the most part. But the character in which property is held, and the character in which the capacity to act is enjoyed and acts are done, are not in pari materia. The latter character is a quality of the company itself, and conditions its capacities and its acts. It is not a mere part of its energies or acquisitions, and if that character must be derivable not from the circumstances of its incorporation, which arises once for all, but from qualities of enmity and amity, which are dependent on the chances of peace or war and are attributable only to human beings, I know not from what human beings that character should be derived, in cases where the active conduct of the company's officers has not already decided the matter, if resort is not to be had to the predominant character of its shareholders and corporators." Lord Parker then refers to certain authorities in the United States Courts and the Courts of this country, showing that for certain purposes a Court may and must look behind the corporation and take into account the personalities of the corporators, and that there is no impenetrable screen interposed by registration between the company and its shareholders. He then proceeds as follows: "My Lords, the truth is that considerations which govern civil liability and rights of property in time of peace differ radically from those which govern enemy character in time of war. Joint-stock enterprise and English legislation and decisions about it have developed mainly since this country was last engaged in a great European War and have taken little, if any, account of warlike conditions. The ideal of joint-stock enterprise, that with limited liability the more unlimited the trading the better, is an

ideal of profound peace. The rule against trading with the enemy is a belligerent's weapon of self-protection. I think that it has to be applied to modern circumstances as we find them, and not limited to the applications of long ago, with as little desire to cut it down on the one hand as to extend it on the other beyond what those circumstances require. Though it has been said by high authority (see *M'Connell* v. *Hector* (1) and *Esposito* v. *Bowden* (2)) to aim at curtailing the commercial resources of the enemy, it has, according to other and older authorities, the wider object of preventing unregulated intercourse with the enemy altogether. Through the Royal licence, which validates such intercourse and such trade, they are brought under necessary control. Without such control they are forbidden. To my mind the rule would be deprived of its substantial justification, and be reduced to a barren canon, if it were held, in circumstances such as these, that it had no application by reason of the mere fact that the company is registered in London. My Lords, having regard to the foregoing considerations, I think the law on the subject may be summarized in the following propositions :— (1.) A company incorporated in the United Kingdom is a legal entity, a creation of law with the status and capacity which the law confers. It is not a natural person with mind or conscience. To use the language of Buckley L.J. : 'it can be neither loyal nor disloyal. It can be neither friend nor enemy.' (2.) Such a company can only act through agents properly authorized, and so long as it is carrying on business in this country through agents so authorized and residing in this or a friendly country it is prima facie to be regarded as a friend, and all His Majesty's lieges may deal with it as such. (3.) Such a company may, however, assume an enemy character. This will be the case if its agents or the persons in de facto control of its affairs, whether authorized or not, are resident in an enemy country, or, wherever resident, are adhering to the enemy or taking instructions from or acting under the control of enemies. A person knowingly dealing with the company in such a case is trading

(1) (1802) 3 Bos. & P. 113. (2) (1857) 7 E. & B. 763, 779.

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with the enemy. (4.) The character of individual shareholders cannot of itself affect the character of the company. This is admittedly so in times of peace, during which every shareholder is at liberty to exercise and enjoy such rights as are by law incident to his status as shareholder. It would be anomalous if it were not so also in a time of war, during which all such rights and privileges are in abeyance. The enemy character of individual shareholders and their conduct may, however, be very material on the question whether the company's agents, or the persons in de facto control of its affairs, are in fact adhering to, taking instructions from, or acting under the control of enemies. This materiality will vary with the number of shareholders who are enemies and the value of their holdings. The fact, if it be the fact, that after eliminating the enemy shareholders the number of shareholders remaining is insufficient for the purpose of holding meetings of the company or appointing directors or other officers may well raise a presumption in this respect. For example, in the present case, even if the secretary had been fully authorized to manage the affairs of the company and to institute legal proceedings on its behalf, the fact that he held one share only out of 25,000 shares, and was the only shareholder who was not an enemy, might well throw on the company the onus of proving that he was not acting under the control of, taking his instructions from, or adhering to the King's enemies in such manner as to impose an enemy character on the company itself. It is an a fortiori case when the secretary is without authority and necessarily depends for the validity of all he does on the subsequent ratification of enemy shareholders. The circumstances of the present case were, therefore, such as to require close investigation and preclude the propriety of giving leave to sign judgment under Order XIV., r. 1. (5.) In a similar way a company registered in the United Kingdom, but carrying on business in a neutral country through agents properly authorized and resident here or in the neutral country, is prima facie to be regarded as a friend, but may, through its agents or persons in de facto control of its affairs, assume

an enemy character. (6.) A company registered in the United Kingdom but carrying on business in an enemy country is to be regarded as an enemy." Be it observed that what Lord Parker is dealing with is enemy character and the tests to be applied for the purpose of ascertaining whether a limited company is or is not of enemy character. He decides that the character of the individual shareholders (though very material for some purposes) does not affect the character of the company, but that the true test is control, the analogue of that residence which invests an individual residing in an enemy country with enemy character. As I read Lord Parker's remarks, he means that, if at the outbreak of war the control of the limited company is in the hands and power of persons resident in an enemy country, then on the outbreak of war the company assumes an enemy character. True it is that it may well be (as pointed out by Lord Atkinson at p. 325) that there may be a sufficient number of shareholders not being enemies " to set up again " an organisation for the control and management of its affairs and so far divest it of its enemy character and enable it to carry on business legitimately. That, however, is a question different from the question which I have to decide—namely, whether at the moment of the outbreak of the war these five uncompleted contracts with the Bayer Co.—namely, J. 2, K., L., M. and O.—were contracts with a company which at that moment assumed an enemy character.

If, as Lord Parker intimates, control is in the case of a company the analogue of residence in the case of an individual for the purpose of ascertaining enemy character, then it seems to me that the Bayer Co., Ld., must be held to have at the outbreak of war assumed enemy character. At that moment the control of the company was in the hands and power of persons resident in, and nationals of, an enemy country. It may be that, the probability of active German interference having been cut off by the outbreak of war and there being a quorum of directors in this country, it was possible for the company to divest itself of enemy character and lawfully carry on fresh business here; but, so far as regards the five

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contracts which I am dealing with and which were current at the outbreak of war, they became, in my opinion, dissolved by the outbreak of war as being current contracts entered into with a company which eo instanti assumed enemy character. They became contracts with an enemy. Nor does the presence in each of these five contracts of a suspensory clause upon, among other events, war assist the claimants. The abrogation of these executory contracts by the outbreak of war is founded on public policy, and, even if it be assumed that the word "war" in the suspensory clauses included a war between this country and Germany, the clauses themselves would be void as against public policy: *Ertel Beiber & Co.* v. *Rio Tinto Co.* (1)

This decision involves, of course, the rejection of all claims under these five contracts; but, in view of the importance of these cases, it is right that I should indicate my views upon some of the other matters which were argued before me as grounds for the rejection of the claims. These arguments were upon the footing that the Bayer Co., Ld., was not a company which at the outbreak of war assumed an enemy character.

The agency point I have been unable to appreciate. It was said that the Bayer Co., Ld., though purporting to contract as a principal, was really contracting or must be treated as contracting as agents for the Farbenfabriken and, therefore, as agent for one who subsequently became an enemy. In my opinion, upon the evidence before me the relationship between the Bayer Co., Ld., and the Farbenfabriken was purchaser and vendor. With the incorporation of the limited company a change was made in the legal relationship existing between the Farbenfabriken and those who sold its goods in this country. That relationship had undoubtedly been agent and principal; it was altered for a deliberate purpose into that of purchaser and vendor, the purchaser reselling here for its own profit. The relationship of principal and agent was carefully put an end to. The expression agent for somebody's goods is often used in the

(1) [1918] A. C. 260.

sense, not of connoting the relationship of principal and agent, but for the purpose of indicating that a person is in a position to sell and supply goods of a certain manufacture. In that sense the Bayer Co., Ld., was agent for the Farbenfabriken's goods. But it resold those goods here as principal, and not as agent for the Farbenfabriken so as to make the contracts which it entered into contracts between the English buyers and the Farbenfabriken.

Another ground for rejection suggested was that the parties to the contract contracted on the footing that the goods sold would come only from Germany, and that, accordingly, the continued existence or further performance of the contracts would involve intercourse with the enemy or tend to assist the enemy. The point here is that the doctrine which declares illegal and abrogates executory contracts with enemies existing at the outbreak of war applies to all contracts which involve intercourse with the enemy or tend to assist the enemy, even though no enemy be a party to the contract—that is to say, that these five contracts, though made between British contracting parties (as for the purpose of the argument they must be deemed to have been made), are nevertheless contracts the performance of which would involve intercourse with the enemy or tend to assist the enemy. Contracts made directly with enemies as contracting parties are declared illegal on the ground of public policy based upon one of two reasons, either that the further performance of the contract would involve intercourse with the enemy or that the continued existence of the contract would confer upon the enemy an immediate or future benefit: see *Zinc Corporation* v. *Hirsch* (1); *Clapham Steamship Co. Case* (2); *Naylor, Benzon & Co.* v. *Krainische Industrie Gesellschaft* (3); *Ertel Bieber & Co.* v. *Rio Tinto Co.* (4)

But assume a contract between British subjects, but of such a nature that either its further performance involves intercourse with the enemy or its continued existence would confer upon the enemy an immediate or future benefit. Does

(1) [1916] 1 K. B. 541.
(2) [1917] 2 K. B. 639.
(3) [1918] 1 K. B. 331.
(4) [1918] A. C. 260.

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such a contract become void on the ground of illegality upon the outbreak of war? The illegality being based upon considerations of public policy, I can see no reason why a contract of such a nature should not become void on the outbreak of war, irrespective of any question whether the parties thereto are enemies or friends. The test should be, in my opinion, not whether one of the parties to the contract is an enemy, but whether the contract involves intercourse with the enemy or confers an immediate or future benefit on the enemy. This indeed appears to follow from the decision in *Veithardt & Hall* v. *Rylands Brothers.* (1) This case and the facts thereof deserve close attention inasmuch as points of similarity exist between it and the cases before me. The proceedings there came before the Court in the form of a special case stated by consent for the opinion of the Court under the Rules of the Supreme Court, Order XXXIV. I have been supplied with a copy of the special case and the correspondence in the matter. The facts were as follows: The plaintiffs, Veithardt & Hall, Ld., were a company registered in England. They had on many occasions previous to the contract in question in the action sold and delivered to the defendants steel wire rods, which in the great majority of cases had to the knowledge of the defendants been obtained by the plaintiffs from the works of a German company called Deutsche Drahtwalzwerke Aktiengesellschaft, Düsseldorf. By a contract of May 2, 1914, the plaintiffs agreed to sell and the defendants agreed to buy 5000 tons of Continental Mild Thomas Basic steel wire rods. Complete delivery need not be taken by the defendants until a date in 1915. The contract incorporated by reference a clause in the Aktiengesellschaft's general conditions of sale as to strikes, lock-outs and other unforeseen hindrances preventing execution in due time. The clause was in the following terms: "In case of force majeure as strikes or combinations of workmen or accidents war or mobilization or want of raw material arising through suppliers of the works not fulfilling obligations entered into or any other occurrence which may partially or

(1) 116 L. T. 706; 86 L. J. (Ch.) 604.

wholly interfere with the delivery same may be partially or wholly suspended during the continuance of any or either of these occurrences. In such cases however the Association" —meaning thereby the works in Germany—"are prepared to entrust other works"—meaning thereby other works in Germany—"with the executions of the orders if at all possible," the words "meaning thereby other works in Germany" being interpolated in the special case. For the purposes of this contract of May 2, 1914, the plaintiffs covered themselves by means of a contract with the Aktiengesellschaft for the supply of the rods contracted to be sold by the plaintiffs to the defendants. Upwards of 4500 tons were undelivered by the plaintiffs to the defendants at the outbreak of the war, and in the special case the following facts are stated: "On August 21, 1914, the plaintiff company wrote to the defendant company a letter in the following words: 'Pending Business Obligations.' Various friends having approached us in regard to material on order and on contract with us for supply from continental sources, we feel prompted to advise you that naturally under the present physical impossibilities brought about by the war we cannot possibly effect deliveries, or in fact communicate with our suppliers. As regards the position later on, this, of course, will entirely depend upon the legal aspect of the situation as may be decided by the laws of this country. We cannot accept any liabilities beyond this, although naturally we will do the very best we can for you as heretofore." Then the plaintiff company again wrote: "Further to our letter of August 21, 1914, we beg to point out to you that the physical obstacles still existing through the war have rendered performance of the above contract altogether impossible. Whilst the contract has thus lapsed through the expiration of the stipulated time still we will at the termination of hostilities do our best to make some arrangement with our supplying works whereby our mutual interests in this unfortunate business may best be served. We will keep you duly advised of any developments in this direction." Then it appears that by an order of the Board of Trade the

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business carried on in the United Kingdom of the plaintiff company, Veithardt & Hall, Ld., was ordered to be wound up under the Trading with the Enemy Amendment Act, 1916, and in para. 14 of the special case it is stated as follows: "Since August 6, 1914, it has by reason of the war been impossible for the plaintiff company to obtain from Germany steel wire rods of the description mentioned in the said contract of May 2, 1914, and the plaintiff company was and is unable to deliver or to procure to be delivered to the defendant company the said balance of 4572 tons 12 cwt. 3 qrs. 2 lbs. mentioned in paragraph 7 of this Case or any part thereof. The defendant company has not in fact required the plaintiff company to make or procure such delivery." Then the contentions of the parties are set out: "The defendant company claims and the plaintiff company denies that the plaintiff company by their letter of January 13, 1915, repudiated the said contract and thereby committed a breach of the same and that they the defendant company are entitled to recover damages in respect of such alleged breach. Further or in the alternative the defendant company claims and the plaintiff company denies that delivery of the aforesaid balance is only suspended during the period of war and that the defendant company are entitled to delivery thereof at the conclusion of the war," and the two important questions submitted to the Court were these, first of all: "Whether the plaintiff company is in the circumstances under any obligation to the defendant company under the said contract of May 2, 1914, and whether such contract so far as the same has not been already performed ought to be treated as cancelled or determined or merely suspended. (2.) Whether the obligations (if any) of the plaintiff company to the defendant company under the said contract ought to be satisfied by the payment of damages, and if so how such damages ought to be assessed or ascertained." It will be noted that the contract was for the supply of unascertained goods, but goods which but for the outbreak of the war would have come from Germany. Younger J. held that the

outbreak of the war between England and Germany made the further performance of the contract illegal because it would involve intercourse with the enemy. His decision was affirmed in the Court of Appeal. That is a clear decision that the further performance of a contract which in fact involves intercourse with the enemy is illegal even though no enemy is party to the contract.

Turning now to the five contracts which I am considering—J. 2 was on the face of it a contract for the supply of dyestuffs described as "direct convention blacks" and identified by letters or numbers as the manufacture of the Farbenfabriken or other German manufacturers. Samples from Germany were in the possession of the Bradford Association. The literature of the Farbenfabriken was disseminated among the English company's customers, and the English company described themselves to their customers and to the world at large as sole importers for Great Britain and Ireland of the Farbenfabriken's manufactures. There is no doubt in my mind, upon the evidence, that this contract was to the knowledge of both parties a contract for the supply of goods to be obtained from Germany.

K. differs from J. 2 in that there is nothing on the face of the contract in the nature of identifying letters or numbers, but, in my opinion, the result is the same. It was a contract for the supply of goods to be obtained to the knowledge, and according to the intention, of both parties from Germany.

L. and M. are on the same footing as J. 2.

O. is a contract for the supply of rongalite. This was in fact a manufacture of the Badische Fabrik. There is also evidence that at one time it was also being manufactured by the Mersey Chemical Works in England. Whether this was so at the date of the contract does not appear. It was not being manufactured there when war broke out. I have no doubt, upon the rest of the evidence, that O. was a contract for the supply of goods to be obtained to the knowledge, and according to the intention, of both parties from Germany. Be it observed also, in this connection, that

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no one was called on behalf of any of the purchasers under these contracts to suggest that the goods to be supplied could be obtained elsewhere but from Germany, or that it was for a moment contemplated by any one that the goods were to be other than of German manufacture. Suggestions were from time to time thrown out in cross-examination that supplies of this or that dyestuff might possibly have been obtained from this or that firm in England or elsewhere than in Germany, but I shrewdly suspect that, if war had not intervened and the vendors under these contracts had tendered goods not the manufacture of the Farbenfabriken concern, the purchasers under these contracts would have been the first to complain and in no uncertain tones.

Would the further performance of these five contracts after war broke out have involved intercourse with the enemy? In my opinion, it clearly would. The pre-eminent position of Germany at the outbreak of the war in regard to the manufacture and supply of synthetic dyestuffs was well known. Evidence of this was given before me. Some four-fifths of the synthetic dyestuffs consumed in this country were imported from Germany. Nor could the contracts have been fulfilled from stocks in this country; they were wholly insufficient for this purpose. Thus, at the outbreak of the war the Bayer Co., Ld., had in stock about 1,000,000 lbs. of dyestuffs. The undelivered balances of all their contracts amounted to more than ten times that amount.

In the result, I am satisfied that these contracts were contracts for the supply of goods to be obtained from Germany, that on the outbreak of the war their further performance involved intercourse with the enemy and became illegal accordingly. The claims for damages in respect of these contracts fail upon this ground also. If I am right in this, the suspensory clauses (even on the assumption that the word "war" therein includes a war between England and Germany) are of no avail. They are void as against public policy: *Ertel Bieber & Co.* v. *Rio Tinto Co.* (1)

(1) [1918] A. C. 260.

Let me now deal with a third ground upon which it was contended that these claims must fail—namely, what was termed the frustration point. It is put thus : These contracts provide for continuous performance within fixed times, comparatively short, subject to minor postponements from specified causes. The source of supply was intended by all parties to be Germany. The contracts were made at a time when, under the commercial conditions which prevailed, there was unrestricted trade with Germany and freedom in the sellers to obtain the supplies from Germany ; and they were made upon the basis that those conditions should continue. The basis having ceased to exist by reason of the outbreak of the war between England and Germany, the commercial object of the contracts was frustrated and the contracts became dissolved.

The doctrine of dissolution of a contract by the frustration of its commercial object rests on an implication arising from the presumed common intention of the parties. If the supervening events or circumstances are such that it is impossible to hold that reasonable men could have contemplated that event or those circumstances and yet have entered into the bargain expressed in the document, a term should be implied dissolving the contract upon the happening of the event or circumstances. The dissolution lies not in the choice of one or other of the parties, but results automatically from a term of the contract. The term to be implied must not be inconsistent with any express term of the contract. These general statements are, I conceive, justified by the language used, and the views expressed, by Lord Sumner in *Bank Line* v. *Capel & Co.* (1), and by the Lords before whom was argued the *Tamplin Case.* (2)

The event which has happened here is the war between this country and Germany, of long duration, bringing in its train complete stoppage of supplies of dyestuffs from Germany, upheavals in prices, freights and values, dislocation of shipping and commerce, Government restrictions and embargoes, and culminating after the conclusion of hostilities

(1) [1919] A. C. 435. (2) [1916] 2 A. C. 397.

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in the passing by the Legislature of this country of an Act (the Dyestuffs (Import Regulation) Act, 1920) prohibiting until the year 1931 the importation into the United Kingdom of all synthetic dyestuffs and intermediate products. I put to myself the following question which was put by Lord Loreburn in the *Tamplin Case* (1): Supposing that during the negotiation of these contracts the parties had contemplated the possibility of this war and the change in conditions which it involved, would they as reasonable men have intended that the contract should bind under or notwithstanding the new conditions? Would they have taken their chance of them, or would they have said: "If that happens, it is all over between us"? To my mind, there is only one possible answer. No reasonable man would enter into these contracts on that footing. To agree that contracts such as these for delivery of goods over short periods should be interrupted by a war between the country of the contracting parties and the country of supply, and should on the termination of the war be resumed at a date which no man could foresee and under commercial and political conditions which no man could foretell, would be to make a contract absolutely in the dark and one of a most unbusinesslike nature. In my opinion, the parties contracted on the footing that peace would continue to exist between the country of the contracting parties and the country of the source of supply, and that the source of supply would remain open; and (subject to two other points) a term should be implied providing for the dissolution of the contract in the event of war breaking out between those two countries, whereby the source of supply became blocked for an indefinite period of time. That is a term which should be implied so as to give to the contracts the effect which the contracting parties must as business men be deemed to have intended.

There are, however, two further points to be considered in this connection. First, is such a term, if implied, inconsistent with any express term of the contracts? I think not.

(1) [1916] 2 A. C. 397.

The suspensory clauses refer to war, but, in my opinion, they do not refer to the kind of war which in fact occurred, namely, a war between the country of the contracting parties and the country of the source of supply. The reference to war in these contracts is in general terms, and, in my opinion, a war between England and Germany was not in the contemplation of the contracting parties: see and compare *Veithardt & Hall* v. *Rylands Brothers* (1) and per Lord Dunedin in *Ertel Bieber & Co.* v. *Rio Tinto Co.* (2) Even if I am wrong in this construction of these suspensory clauses and it be held that in terms they provide for a suspension of the contracts pending the duration of a war between England and Germany, there is much to be said for the view that, in a contract between two British subjects for the supply in England of goods to be obtained from Germany, a suspensory clause in terms referring to a war between England and Germany would be illegal and inoperative, and this on the grounds indicated by Rowlatt J. in the *Clapham Steamship Case.* (3) But I prefer to rest this part of the case upon the ground that the suspensory clause does not apply to, and was never intended by the parties to apply to, a war between England and Germany.

Secondly, does the doctrine of frustration apply at all to contracts for the supply of unascertained goods? There is not much authority upon the point. In *Blackburn Bobbin Co.* v. *Allen & Sons* (4) McCardie J. discussed the question at length and stated (5) his conclusion in the following words: "My conclusion upon the matter is that in the absence of any question as to trading with the enemy, and in the absence also of any administrative intervention by the British Government authorities, a bare and unqualified contract for the sale of unascertained goods will not (unless most special facts compel an opposite implication) be dissolved by the operation of the principle of *Krell* v. *Henry* (6), even though there has been so grave and unforeseen a change

(1) 116 L. T. 706; 86 L. J. (Ch.) 604.
(2) [1918] A. C. 272, 273.
(3) [1917] 2 K. B. 639.
(4) [1918] 1 K. B. 540.
(5) Ibid. 550.
(6) [1903] 2 K. B. 740.

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of circumstances as to render it impossible for the vendor to fulfil his bargain. If I were to hold otherwise I should create a rule the result of which no man can foresee, and to the operation of which no judge can satisfactorily fix the limits." It will be observed that the learned judge does not definitely exclude the application of the doctrine to such a contract. He keeps the door open in cases where trading with the enemy or administrative intervention is involved and where special facts exist. There is also a statement by Lord Reading C.J. in a case of *Thornett & Fehr* v. *Yuills* (1) that no question of frustration can arise on a contract which is for the sale of unascertained goods. No authority is given for this proposition. The case was not a case in which failure to deliver the goods arose from the war. The manufacturers (whose agents had contracted to sell) had simply not manufactured, and it was sought to imply a term, in a contract to sell certain quantities of particular tallow "of 1919 make," that goods of that kind should be made in 1919. However correct the decision in that case may have been, it affords me little or no assistance in the present case. Speaking for myself, I can see no reason why, given the necessary circumstances to exist, the doctrine should not apply equally to the case of unascertained goods. It is, of course, obvious from the nature of the contract that the necessary circumstances can only very rarely arise in the case of unascertained goods. That they may arise appears to me undoubted and is indicated by the remarks of McCardie J. which I have just cited. (2) *Veithardt & Hall* v. *Rylands Brothers* (3) and *E. Hulton & Co.* v. *Chadwick & Taylor* (4) were cases of contracts in respect of unascertained goods; and in the latter case the parties were held freed from liability owing to alteration of circumstances. The foundation of the doctrine being the happening of such events that no reasonable man would have entered into the contract with those events in contemplation, I can see no reason for refusing to apply the doctrine on the happening

(1) 37 Times L. R. 31.
(2) [1918] 1 K. B. 550.
(3) 116 L. T. 706; 86 L. J. (Ch.) 604.
(4) 34 Times L. R. 230.

of such events. Even if I take as my guide the carefully worded conclusion of McCardie J., I find these five contracts to lie well within its ambit. There exist in regard to them questions as to trading with the enemy, administrative intervention and other most special facts, including one which gives to the unascertained goods almost a specific touch, that is to say, that the goods were in the contemplation of the parties to come from Germany.

In the result, I decide against the claimants under these five contracts also on the ground that their commercial object has been frustrated and that they became dissolved on the outbreak of war with Germany.

Up to this point I have rejected the claims under the five contracts, J. 2., K., L., M. and O. on the three grounds (1.) the Continental Tyre point, (2.) the illegality point and (3.) the frustration point. I will now see how far the first ground applies to the other five companies and how far the second and third grounds apply to the rest of the non-indigo contracts.

I have had evidence given before me in regard to all the six companies—their origin, their constitution, their directorates, their shareholders, their course of business and their connection with the various German parent concerns. I have carefully considered all this evidence. I have already decided that the five contracts with the Bayer Co., Ld., were contracts with a limited company which, on the outbreak of the war, instantly assumed an enemy character. I do not propose to analyse the evidence relating to the other five companies. It is on record and can be referred to if and when occasion arises. Suffice it to say that the Bayer Co., Ld., is, in my opinion, the one of the six companies which had the best chance, on the evidence, of escaping from this enemy taint. The veil behind which the German manufacturers controlled and pulled the strings by which the British figures were manipulated was rather less transparent than the corresponding screen in the case of the others. Where a Bayer has failed, a Badische, a Griesheim, a Kalle, a Berlin Aniline and a

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Meister Lucius & Bruning cannot hope to succeed; or, to put it more accurately, where the Bayer controller has succeeded, the controllers of the other companies could not possibly fail.

Let me now see how far the illegality point and the frustration point affects the other non-indigo contracts, contracts either with the Bayer Co. or with the other five companies. Before dealing with these contracts seriatim, I would observe that, speaking generally, the evidence is similar as to all the companies in regard to, first, the sales by agents (in the strict sense) of products of the German concern in the period preceding the incorporation of the particular limited company; secondly, the statements by the limited companies to customers and the public that they were the sole importers of the German goods; thirdly, the dissemination among the customers of catalogues, pamphlets and other literature relating to the German works and products, and containing names, marks and numbers identifying such products; and, fourthly, that the stocks usually carried in this country would be quite insufficient to fulfil contracts pending at any given time. Further, there is no need to repeat (though they should be borne in mind) the details which establish the almost complete dependence of this country upon Germany for the supply of synthetic dyestuffs. I may, however, recall, without repeating my earlier comments upon the fact, that no purchaser under any contract called any witness to suggest that the goods could or ought to have been obtained elsewhere than from Germany, or that any one ever contemplated any source of supply other than Germany.

The remaining non-indigo contracts are twenty-two in number, and I will deal with them now individually (see Note I. at end of report).

I have now completed my pilgrimage through all the contracts submitted for consideration other than the indigo contracts. I trust that none have escaped unobserved in the crowd.

The indigo contracts are four in number. They have been

kept apart in these proceedings because they possess this distinct feature—that they relate to the sale of a colour which was at the dates of the contracts being manufactured in England by Meister Lucius & Bruning, Ld. Some years before the war, in pursuance of resolutions passed by that company on December 12, 1907, the directors erected (with all necessary plant and equipment) works at Ellesmere Port for the manufacture of synthetic indigo. Certain patents relating to such manufacture were transferred by the German concern of Meister Lucius to the limited company for the purpose of the same being worked in the United Kingdom. The manufacture of synthetic indigo, thus commenced, was carried on on a large scale until the outbreak of war, and contracts were in the ordinary course of business entered into. Those with which I am concerned are classes D., E. and F. (see Note II. at end of report). It is obvious from a consideration of the terms of these four contracts that, but for the special feature that the manufacture of indigo was carried on at Ellesmere Port by Meister Lucius & Bruning, Ld., they would fall within my decisions in regard to contracts J. 2., K., L., M. and O. It is now necessary to consider the relevant facts in connection with this distinctive feature, and see if any different result ensues.

Synthetic indigo was first introduced into this country by the Badische German concern in 1897. It was solely manufactured in Germany until the Ellesmere Port works were started in or about the year 1908. Down to the outbreak of war its manufacture continued in Germany, and also at Ellesmere Port, but nowhere else in this country. Synthetic indigo is produced as a result of treating phenyl-glycine with sodium amyde (a compound of sodium metal and ammonia). This treatment is a very delicate process and one requiring considerable experience. That was the process which was carried on at Ellesmere Port. There are other processes of manufacturing indigo, but they do not concern us here. The contracts here in question were undoubtedly contracts for the supply of indigo made by the process shortly described above. The essential material for

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the manufacture of this indigo is phenylglycine. Down to the outbreak of war it was never made in this country. It was made in Germany. All the synthetic indigo manufactured by Meister Lucius & Bruning, Ld., at Ellesmere Port down to the outbreak of war was made from phenylglycine supplied by the Farbwerke in Germany. For the production of phenylglycine aniline oil is essential. I need trace the pedigree no further in detail; suffice it to say that benzine, nitric acid, acetic acid, chlorine and sulphuric acid figure in the scheme, substances required for explosive and other military purposes. Sir William Plender was at a very early stage placed in charge of Ellesmere Port as controller; and from the very first did all that man possibly could do to secure the continuance of the manufacture of synthetic indigo at Ellesmere Port. He had at his disposal a certain amount of indigo in stock. He had also a certain amount of phenylglycine in stock at the works, which had previously to the war been supplied to Meister Lucius & Bruning, Ld., by the Farbwerke. From the indigo then in stock and from indigo manufactured from raw material then in stock, he made after August 4, 1914, to customers who had pre-war contracts, deliveries amounting to some 396 tons. These deliveries were all made in the year 1914. In the early part of November, 1914, the manufacture of indigo at Ellesmere Port had to be suspended, no phenylglycine being obtainable. After untiring and unceasing efforts Sir William Plender succeeded at a later stage in obtaining some phenylglycine, with the result that under contracts entered into by himself (at dates between April 26, 1915, and August 3, 1915) he was able to make deliveries amounting to some 420 tons or thereabouts. The crucial obstacle in his path was the impossibility, when the war broke out, of obtaining supplies of phenylglycine. A process for producing it known as the potassium cyanide process was tried and proved a failure. Ultimately on April 29, 1915 (nine months after the outbreak of war and six months after Ellesmere Port had ceased to manufacture), Sir William Plender obtained a contract with the Castner Kellner Alkali Co., Ld., for the supply of phenylglycine,

which he hoped would ensure a supply of indigo for the remainder of that year. The Castner Kellner Co. (through no fault of their own) were unable to supply the contract quantities. Instead of seven tons a week, their deliveries over thirteen weeks did not average three tons a week. In the following thirteen weeks, instead of fourteen tons a week, they averaged but little more than five tons a week. Their trouble was inability to obtain aniline oil, the essential ingredient for its manufacture being required for the production of war material and controlled. As a result, early in October, 1915, manufacture at Ellesmere Port had to be suspended once more. No deliveries of phenylglycine were made by the Castner Kellner Co. during the last three months of 1915, but, although Sir William succeeded in obtaining some thirty tons of aniline oil for them from British Dyes, Ld., the Ellesmere Port works were forced to close down in May, 1916, and the works and undertaking were sold. Notwithstanding suggestions in cross-examination as to the possibility of obtaining aniline oil during the period in question, I am quite satisfied by the evidence of Sir William Plender and Mr. Audred Thomas Smith that, having done their very best to obtain aniline oil, they were unable to do so, and that aniline oil was not in fact procurable. It follows from this that it was impossible to produce phenylglycine, and, consequently, impossible for Meister Lucius & Bruning, Ld., to manufacture synthetic indigo at Ellesmere Port.

The four contracts in question are for the supply of synthetic indigo which was manufactured either by a German firm in Germany or by a limited company in England ; the manufacture consisting of the treatment in a particular way of phenylglycine which was at the dates of the contracts procurable only from Germany. The facts that phenylglycine was essential to the manufacture of indigo and that it was procurable only in Germany were facts notorious in the indigo trade. I am asked to believe that the purchasers under these contracts were unaware of this fact, and believed they were dealing (so far as Meister Lucius & Bruning, Ld., were concerned) in a purely British product. I decline to do

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so. With the exception of two witnesses, the evidence is all the other way. Mr. John Horridge, a director of two of the five constituent members of the Indigo Buying Amalgamation, was one; Mr. Richard Pollard was another. I cannot help feeling that their innocence in this regard was their chief recommendation as witnesses on behalf of the claimants. Such others (and they were very few) as were called admitted the fact and their knowledge of it. Whatever the truth may be as to knowledge or otherwise, the fact remains that the contracts are contracts for the supply of goods either manufactured in Germany or manufactured here—and, if to be manufactured here, incapable of manufacture unless there was forthcoming a supply of material unprocurable elsewhere than from Germany. That was the position when war was declared between this country and Germany. From the outbreak of war the then only source of supply was absolutely cut off. For some nine months afterwards no source of supply existed at all; and it was not until April, 1915, that a source was with infinite labour built up, only to evaporate in the course of a short time.

In these circumstances I ask myself, Is there any substantial difference, or any difference at all, in the legal position of these indigo contracts, as regards the illegality point? I think there is none. Upon the evidence, these indigo contracts are contracts which, if performed after the outbreak of war, would involve intercourse with the enemy, and they became illegal accordingly. The suspensory clauses stand on precisely the same footing as the suspensory clauses in the non-indigo contracts.

How do these indigo contracts stand as regards the frustration point? It appears to me that they stand in just the same position as do the contracts J. 2, K., L., M. and O. In the latter cases the goods contracted for were to come from Germany. In the indigo contracts the goods contracted for were either to come from Germany or to result from the treatment in this country of material to come from Germany. In my opinion, in the cases too of the indigo contracts, the parties contracted on the footing that peace would continue to

exist between the country of the contracting parties and the country of the source of supply of the finished article or the essential material for the production of the finished article, and that such source of supply should remain open. A term should be implied providing for the dissolution of the contracts in the event of war breaking out between those two countries, whereby the source of supply became blocked for an indefinite period of time. My remarks in connection with the contracts J. 2, K., L., M. and O. with reference to the suspensory clause and with reference to the applicability of the doctrine of frustration to the sale of unascertained goods apply equally to the indigo contracts. In my opinion, claims under these contracts fail equally upon the frustration point.

In the result, all the claims fail, and I direct each controller to reject, as debts due from his company, the claims under such of these thirty-one contracts as are made with his particular company.

There remains only the question of costs. The claimants, though asserting rights on their own behalf and for their own benefit, are nevertheless claimants under contracts which have by some process been selected as representative of the whole mass of contracts. To that extent they are here in a representative capacity. I understand that, although there is no formal order to that effect, some direction was given by my predecessor in this jurisdiction, Younger J., to the effect that the costs of all parties, as between solicitor and client, should be paid out of the assets of the different companies and the parties have attended on this footing. This direction has had one very material result. The case was presented and argued in the most full and complete manner. If I have erred in this judgment, it is not for want of guidance, but in spite of the great assistance which I have received from all concerned in the case. If I had been anxious (which I am not) to take a different view as to costs, I should still feel bound, by privity of estate, to adhere to my predecessor's direction. Accordingly, in each summons, I direct the controller to reject the claims; I order the costs

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of all parties to the summons to be taxed as between solicitor and client, and I direct the controller to pay and retain such costs out of the assets.

Solicitors for the Badische Co.: *Robbins, Olivey & Lake, for Slater, Heelis & Co., Manchester.*

Solicitors for the Bayer Co.: *Charles Russell & Co., for Skelton & Co., Manchester.*

Solicitors for the Griesheim Elektron and the Berlin Aniline Co.: *Grundy, Kershaw, Samson & Co.*

Solicitors for Kalle & Co.: *Winter, Bothamley, Wood & Murray, for Briggs & Whitworth, Manchester.*

Solicitors for Meister Lucius & Bruning: *Budd, Johnson, Jecks & Colclough.*

Solicitors for the Bradford Dyers Association: *Speechly, Mumford & Craig, for Mumford, Johnson & Co., Bradford.*

Solicitors for the United Turkey Red Co.: *Hore, Pattisson & Bathurst.*

Solicitors for the Calico Printers Association, the Indigo Buying Association, the British Cotton and Wool Dyers Association, F. Scott & Co., and Thomas Welch's executors: *Pritchard, Englefield & Co., for Boote, Edgar & Rylands, Manchester.*

Solicitor for the Board of Trade: *Solicitor to the Board of Trade.*

NOTE I.

A. 1. This is a contract dated December 20, 1913, for the sale by Meister Lucius & Bruning, Ld., to the Calico Printers of 8 tons of alizarine orange and alizarine brown. It contains a duty clause, and a provision that deliveries may be suspended pending certain contingencies which include war. Alizarines were manufactured to some extent in this country before the war by a company called the British Alizarine Co., which belonged (so one witness said) to a great extent to one of the claimants, the United Turkey Red Co. They were also produced by a Swiss company. But the alizarines produced outside Germany were neither as numerous, nor as complex, as those produced in Germany. Their production involved the use of large quantities of certain acids which were controlled from the early days of the war.

A. 2. This is a contract between the same parties dated March 5, 1914, for the sale of 1 ton of thiogene colours as per list, with a similar duty clause and a similar suspensory clause. Thiogene is a name representing a product of the German concern, and the list contains identifying letter marks.

A. 3. This is a contract between the same parties dated January 8, 1914, for the sale of 20 tons of "developers" as per list. It contains a clause providing in terms for the event of an import duty being imposed in Great Britain, and a similar suspensory clause. There are some 15 items in the list, of which three are the exclusive production of the German concern. The remaining 12 were not necessarily their products.

A. 4. This is a contract between the same parties dated February 19, 1914, for the sale of 100 tons of artificial alizarine 20 per cent. solid or anhydrous matter with a proviso that only 10 per cent. of the quantity delivered can be in certain special brands (which are specified) at the contract price. Beyond the 10 per cent., further quantities of such brands were to cost a half-penny per lb. more. The brands are brands of the German concern. The contract contains a duty clause and a similar suspensory clause. Under this contract, apart from delivery of the special Farbwerke brands, something answering to the term "artificial alizarine 20 per cent. solid" could have been got elsewhere than from the particular German concern.

A. 5. This is a contract dated May 22, 1914, again between the same parties, for the sale of 10 tons of hydro-sulphite n.f. concentrated. There is a duty clause and a similar suspensory clause. N.f. is a mark of the German concern. Hydro-sulphite n.f. concentrated is a discharging agent, a product of hydro-sulphite, wholly made in Germany by a very delicate process.

Now as regards these five A. contracts, as to three (namely, A. 2, A. 4, and A. 5) they are in terms wholly for the supply of German products. As to one (namely, A. 3) it includes and contemplates in terms the supply of German products, and the duty clause refers to a duty on import into Great Britain. As regards these four contracts I am satisfied, on the evidence, that they were all contracts which to the knowledge, and according to the intention, of both parties were for the sale of goods to be supplied in this country by the German concern; and that the further performance thereof would have involved intercourse with the enemy. The claims in respect of these contracts fail, in my opinion, also on the illegality point. As regards the frustration point, the grounds of my decision in regard to contracts J. 2, K. L., M. and O. appear to me equally to apply to these four contracts, and I, accordingly, hold that the claims in respect of them fail also upon the frustration point. As regards A. 1, I feel more difficulty. It is for the supply of alizarine orange and alizarine brown, no brands or marks being given to show that they are the products of any particular manufacturer. It was suggested that at all events the evidence showed that alizarine brown was exclusively a Meister Lucius product. Some answers of Dr. Ehrhardt and Dr. Passmore were cited in support of this view, but, from their context, I think that all that was stated was this—that, as between Meister Lucius on the one hand and the Badische on the other, the former called the substance alizarine while the latter called it anthracene. There is, in my opinion, no evidence to show that performance of this contract would involve intercourse with or assist the enemy, or that Germany was the only source of supply contemplated by the parties. I am unable to hold that claims under this contract fail either on the illegality point or on the frustration point.

B. This is a contract dated April 22, 1914, between Messrs. Strang as agents for the Badische Co., Ld., and the United Turkey Red Co., Ld., for

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the sale of 25 tons of paranitraniline. The sold note describes the limited company as the sole importers of the products manufactured by the Badische Aniline & Soda Fabrik, Ludwigshaven. It contains a reduction clause in the following terms: "If during the currency of this contract you should be offered paranitraniline of equal quality by any of our competitors at a lower price, it is left with us on hearing from you to accept the same price or, if not, to cancel respective delivery on account of contract." The suspensory clause runs as follows: "If from fire, floods, war, strikes, an explosion or similar unforeseen accident our manufacturers are prevented from or delayed in making the colour, the contract in so far as regards time of delivery will not be binding." There is also a duty clause. The bought note is in corresponding terms, but in the suspensory clause the word "our" survives. The paranitraniline is not described by any brand or identification mark, but it is clear, from the context of the contract, that the sale was a sale of paranitraniline manufactured or to be manufactured by the Fabrik. In reference to the reduction clause it is to be observed that, with the possible exception of a company called the Clayton Aniline Co., paranitraniline was not manufactured in this country in 1914. Mr. Anderson, the buyer for the Turkey Red, told me that, as far back as 1911 down to the outbreak of the war, they had ceased to be able to obtain the paranitraniline in England. His answers in cross-examination made it clear to me that the paranitraniline under this contract was expected to come, and had necessarily to come, from Germany, even if it did not come from the Badische Fabrik. Claims under this contract must also fail both on the illegality point and on the frustration point.

C. This is a contract dated March 4, 1914, between the Badische Co., Ld., and the Bradford Dyers' Association, Ld., for the sale of 2 tons of rhodamine 6 G. It is similar to B in the description of the Badische Co., Ld., as being the sole importers of the products manufactured by the Fabrik, in the suspensory clause with its reference to "our manufacturers" and in the duty clause. It contains the following provision: "If during the currency of this contract you can prove to us that you can obtain an equally good colour at a lower price, we agree to reduce our price accordingly or to forego the delivery in question. Deliveries so declined by us are to be written off against the contract." Rhodamine 6 G was invented by the Badische Fabrik in 1892. The first member of the rhodamine class of dye was invented by the Badische Fabrik in 1887. Rhodamine was registered as a trade mark, and letters patent were taken out. One witness (Mr. James Robertson) gave evidence of a firm having to cease using the name "rhodamine." This contract C was clearly a contract for the sale of Badische Fabrik products, and claims under it must fail on both points.

P. 1. This is a contract dated June 1, 1914, between the Berlin Aniline Co., Ld., and the Bradford Dyers for the sale of 50 tons of various colours as per list attached. The limited company is described as sole importers of the products of the German Aktien-gesellschaft. It contains a suspensory clause if from fire, floods, war, strikes, explosions or similar unforeseen accidents the limited company are prevented from delivering the colour. There is a duty clause in the event of any duty being levied on the goods on their entrance into the United Kingdom; and there is a side note that the re-sale and importation of the patented articles of the limited company to the United States of America and France is prohibited. The list attached

comprises some 70 colours. Nearly all have identifying numbers or letters. As to one-half of them their composition was not published.

P. 2. This is a contract dated July 9, 1914, between the same parties for the sale of 25 tons of amine black 10 B concentrated 82/100. In other respects the contract is in its terms similar to P. 1. The composition of amine black is not published. There is no doubt in my mind upon the form of these two contracts that they were contracts for goods to be supplied from Germany. The claims under these two contracts must equally fail, both on the illegality point and on the frustration point.

Q. This is a contract dated November 20, 1912, between Griesheim Elektron, Ld., and the Calico Printers for the sale of 100 tons of paranitraniline usual qualities A or B brand. By its terms it ended in 1913, but the time for performance was subsequently extended to the end of 1914 and the quantity altered. It contained a clause: "If buyers can prove to sellers that they can obtain the same results with another material or materials of the competition at a less cost, buyers to have the option of cancelling the balance of the contract so far as these competing materials are concerned if sellers do not meet the competition." Each delivery was to be a separate contract. There was an import duty clause, and there was a suspensory clause which included war. The contract specifies particular brands which were the products only of the German works. Quite apart from this fact, that the contract was one for the supply of goods to come from the works in Germany is clear from a letter during the negotiations for the variation of this actual contract. On December 17, 1913, the limited company wrote to the Calico Printers a letter of that date, stating the arrangement which "our works propose in order to meet you." That refers, and can only refer, to the German works which were to supply the stuff. The claims under this contract must fail on both grounds.

R. This is a contract dated March 3 and 23, 1914, between the limited company "acting on behalf of the firms forming the aniline convention" and the Calico Printers for the sale of aniline salt and/or oil, quality as usual, delivered free buyers' works by any of the convention firms. The subject-matter of the contract is expressed in these words: "Buyers' requirements of aniline salt and/or oil for their own consumption in Great Britain and Ireland over three years after expiration of the present contract which terminates on April 10, 1914, with option for buyers to draw up to one-third part of their requirements from another source of supplies." The contract contained a provision enabling the buyers to cancel the contract in the event of the aniline convention being dissolved. It also contained a suspensory clause pending contingencies over which the vendors have no control (such as war) preventing the manufacture or export of the article. There was a dispute before me as to who comprised the aniline convention. There were three members of it. That the Clayton Aniline Co., Ld., and Read Holliday & Sons, Ld., were two of its members is common ground. They are two English manufacturing companies. The Griesheim controller says that the third member was the German manufacturing firm, the Chemische Fabrik Griesheim. The Calico Printers say that the third member was the Griesheim Elektron, Ld. This latter company was registered on September 27, 1912. At that date it is clear that the third member of the convention was the Fabrik. This appears from a letter written by the Fabrik to the English limited company on October 12, 1912, enclosing a list of contracts as they

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stood on October 1, 1912, and referring specifically to the then current contract for aniline with the Calico Printers. It was suggested, but no proof was adduced in support of the suggestion, that at some later date the English limited company (which never manufactured an ounce of anything) took the place of the Chemische Fabrik in this convention. They apparently had not done so by November 13, 1913, for a letter of that date signed by them and addressed to Manchester points to the Chemische Fabrik being still a member of the convention at that time. Mr. Frederick George Williams, the manager of the English limited company, stated definitely that the limited company was not a member of the convention—that the third member was the Chemische Fabrik. Dr. Ehrhardt at one time had said in his evidence that the aniline convention consisted of three English firms, of whom two were manufacturers. He gave no names, but, when he was recalled and asked definitely who were the members, counsel for the Calico Printers (who was suggesting that the Chemische Fabrik was a member) objected, and the names were not given by Dr. Ehrhardt. I am, however, satisfied, on the form of the contract R. itself, on the letters and on Mr. Williams' evidence, that the third member of the convention was the Chemische Fabrik. The contract is made on behalf of disclosed principals of whom one is an enemy. This is a fatal answer to any claim under contract R. It stands on a different footing from the other contracts. No claim can lie against the agent in respect thereof. Furthermore, although it might conceivably have been fulfilled by the buyer taking deliveries only from the two English manufacturers, it is, nevertheless, a contract direct with three persons jointly, of whom one became an enemy, with the result that, even as regards the other two contracting parties, the contract would be dissolved on the outbreak of the war. Accordingly the claim under R. must fail.

S. 1. This is a contract dated July 1, 1913, between the Griesheim Elektron, Ld., and the British Cotton and Wool Dyers' Association, Ld., for the sale of 25 tons of alizarine red 20 per cent. paste. It contains the following clauses: 1. If the buyers can prove to sellers that they can obtain equally good results with any colour or colours of the competition at a less cost, sellers agree to reduce the prices accordingly on the uncompleted portion of the contract, or to abstain from further delivery if they are not willing to follow the price of the competition; 2. an import clause providing that either party is to have the option of withdrawing or cancelling if either party is not willing to bear the duty (if any); and 3. strikes of workmen, interruption in working, war, damage by fire, inundation and all similar accidents which diminish or make impossible the manufacturing (respectively the consumption), are to be considered force majeure and exempt reciprocally during the continuance of the disturbance from the obligation to make (respectively take) timely delivery. Alizarine red 20 per cent. paste could be obtained from many other sources besides the Chemische Fabrik. I feel some difficulty about this contract. Apart from the context of the contract and general evidence as to the course of business, there is no evidence to show that performance of this contract would necessarily involve intercourse with the enemy or tend to assist the enemy, or that Germany was the only source of supply contemplated by the parties. I am unable to hold that claims under this contract fail either on the illegality point or on the frustration point.

S. 2. This contract was, after a time and for reasons not necessary here to specify, withdrawn from my consideration.

T. 1. This is a contract dated March 30, 1914, between Kalle & Co., Ld., and the British Cotton and Wool Dyers' Association, Ld., for the sale of 30 tons of assorted colours as per list, quality as previously supplied. It provides that deliveries may be suspended pending any contingencies beyond the control of the vendors such as strike, lock-out, fire, accident, war, stoppage of navigation or the like causing a short supply of fuel or raw material or otherwise preventing the manufacture or supply of the articles. The sellers are described as importers of the products of Kalle & Co. Aktien-gesellschaft, aniline colour manufacturers, Biebrich on Rhine. The list contains some 220 items, substantially all identified by letters and numbers, except for some 10 items, the descriptions mean brands of Kalle & Co.'s manufacture in Germany.

T. 2. This contract is dated June 22, 1914, and is made between the same parties. It is for the sale of 10 tons of naphthamine direct blacks as per attached list. It contains the same provisions as T. 1, and all the colours in the list are identified by letters. The word "naphthamine" indicates the manufacture of the German concern. I have no doubt as to these two contracts that they were both for the supply of goods, the source for the supply of which was according to the intention of the parties to be the Kalle Aktien-gesellschaft in Germany. Claims under them must, in my opinion, fail upon both points.

G. This is a contract dated February 25, 1913, between the Bradford Dyers and Meister Lucius & Bruning, Ld., for the sale of the former's total consumption over four years (minimum 10 tons) of hydro-sulphite concentrated powder patented. It contains a duty clause referring to a duty being imposed on the commodity in England. The suspension clause includes "war." Contemporaneously the sellers wrote a letter to the buyers on the subject of rebate. In this they state: "It is a condition of the new contract that we agree to cancel the outstanding balance of the old contract dated July 11, 1912, and with regard to the rebate due on same we are in communication with our works and shall let you have the figures in due course." The reference to "our works" is obviously a reference to the works in Germany, Hydro-sulphite was a convention product; that is to say, there was a convention existing between the makers of it—namely, the Badische Anilin Soda-Fabrik of Ludwigshaven and the Meister Lucius Farbwerke at Hoechst. It would appear that this was well known to the Bradford Dyers. Hydro-sulphite concentrated powder is a more stable body than hydro-sulphite generally. It was manufactured by the same two German concerns. It was not manufactured in this country. It was produced only in Germany, and was a patented process requiring special plant to produce it on a commercial scale. This contract was, in my opinion, a contract for the supply of German made goods, and claims under it must fail on both the illegality point and the frustration point.

U. 1. This contract is dated October 17, 1913, and is made between the United Turkey Red Co., Ld., and Meister Lucius & Bruning, Ld. It is for the sale of 25 tons of beta-napthol R. and ordinary. There is a duty clause referring to the imposition of a duty in this country. There is no suspensory clause. On October 27, 1913, the sellers wrote to the buyers stating, "We are instructed to reduce the prices to you for your new contract for beta-napthol." The reductions are stated, but it is not mentioned in terms from whom the instructions had proceeded. Beta-napthol was produced in Germany. For some years before the war its

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production was confined almost entirely to Germany, and was in the hands of the Bayer works, the Badische works and the Meister Lucius works. Some may have been manufactured in France and Switzerland, but none was manufactured here. In the case of this contract the evidence satisfies me that the parties contracted for a supply of German made goods, and that claims under it must fail on both the points under consideration.

U. 2. This is a contract dated July 15, 1914, and made between the Bradford Dyers and Meister Lucius & Bruning, Ld. It is a contract for the sale of various helindone colours. There is a duty clause referring to a duty being placed on the products by the British Government. There is no suspensory clause. Helindone is a proprietary matter, indicating manufacture by the Meister Lucius works in Germany. It is the name of the product produced by those works. Claims under this contract must similarly fail.

H. 1. This contract is dated July 31, 1914, and is made between the British Cotton and Wool Dyers' Association, Ld., on the one hand, and the Badische Co., Ld., the Bayer Co., Ld., and Meister Lucius & Bruning, Ld., on the other hand. It is a contract for the sale of 50 tons of alizarine (anthracine) brown 20 per cent. paste, orange 20 per cent. paste, and alizarine red powder, "at the undermentioned prices for the respective brands of the three makers mentioned below." The three makers are the three German manufacturers, Meister Lucius, Bayer & Badische. There is a duty clause, and also a suspensory clause which runs as follows: "If from fire, floods, strikes, war, an explosion or similar unforeseen accident our manufacturers are prevented making the colours, the contract in so far as regards time of delivery will not be binding." This is clearly a contract for the supply of German made goods, and claims under it fail, in my opinion, both on the illegality point and on the frustration point.

H. 2. This is a contract dated January 1, 1914, between the British Cotton and Wool Dyers, on the one hand, and the Badische Co., Ld., and the Bayer Co., Ld., on the other hand, for the sale of 134,000 lbs. of alizarine cyanines (blues) or anthracine blues as per lists sent herewith, either brand in the buyers' option to be delivered as far as possible in about equal monthly proportions. The contract contains the following provisions: "In the event of convention prices of certain products being reduced during the term of the contract, you are to have the benefit of such reduction upon the uncompleted portion of the contract. The resale and importation of our patented products into France and the United States of America are prohibited. If from fire, flood, strikes, war, explosion or similar unforeseen accident the vendors are prevented from making the colour, the contract in as far as regards time of delivery will not be binding." The contract also contains a duty clause. The lists referred to in the contract identify the goods sold by distinctive letters and numbers as the products of either the Badische German works or the Bayer German works. There is no doubt, on the evidence, that (notwithstanding the wording of the suspensory clause) the vendors never made the colour or were in a position to make the colour. Equally there can be no doubt that the makers were to be the German concerns with which the vendors under the contract were so closely associated. In the case of this contract also claims thereunder must fail on both points.

H. 3. This contract is dated July 25, 1914, and is made between the British Cotton and Wool Dyers and the Bayer Co., Ld. It is a contract for the sale of 120,000 lbs. alizarine red ordinary brands of 20 per cent. solid or anhydrous matter. It contains a duty clause, and a suspensory clause. The latter

clause is in the following terms: "If from fire, flood, strikes, war, an explosion or similar unforeseen accident the vendors are prevented making the colour, the contract in as far as regards time of delivery will not be binding." Immediately after the contract was signed, the Bayer Co., Ld., wrote to the British Cotton and Wool Dyers the following letter dated July 28, 1914: "We acknowledge receipt of, and thank you for, the signed contract for alizarine red, and have now much pleasure in confirming the usual terms of rebate, which are that you will be entitled to 3 per cent. calculated on the gross value on due and full completion of the contract. You are also entitled to delivery of one-tenth (12,000 lbs.) of the contract amount in the 'extra' brand at the rate for the ordinary qualities, that is to say, on completion of the contract you will be credited with a halfpenny per lb. on deliveries of 'extra brands' up to the proportion of one-tenth as previously." Alizarine red paste was a convention article. The convention included the German Bayer Co. The usual convention rebate terms were the 3 per cent. mentioned in the letter. The alizarine red paste dealt in by the Bayer Co., Ld.—that is to say, the alizarine red paste produced by the German Bayer concern—was of two qualities distinguished in fineness of filtration or brilliancy of shade and known as "ordinary brands" and "extra brands"—though the use of those words does not of itself indicate the manufacture of any particular member of the convention. The right to take one-tenth of the amount contracted for in "extra brands" at the price of the "ordinary brands" was a convention condition. The wording of the suspension clause here is the same as in the case of H. 2, and the same remarks apply. I am satisfied that in this case also the contract was a contract for German made goods, and that claims under it must fail both on the illegality point and on the frustration point.

J. 1. This contract is dated September 4, 1913, and made between Leopold Casella & Co. (a purely German concern at Frankfurt), the Bayer Co., Ld., and the Berlin Anilin Co., Ld., on the one hand, and the Bradford Dyers on the other. It is a contract for the sale of convention blues, the members of the convention being Casella's, the German Bayer concern and the Berlin Anilin Gesellschaft. Further the goods are identified by names showing them to be the products of the three German concerns. This is clearly a case of a contract for the supply of goods coming from Germany, and claims under it must fail on both points. There is a further feature of this contract which is fatal to the allowance of any claim under it. It is a joint contract by three contracting parties (one of them admittedly an enemy) with the Bradford Dyers, and a contract by the Bradford Dyers with the three jointly. Such a contract, one of the contractors being an enemy, was clearly dissolved by the outbreak of war. I was asked to read it as three separate contracts, but this I am unable to do consistently with its form and language.

NOTE II.

D. This contract is dated July 9, 1914, and is made between the executors of Thomas Welch and Meister Lucius & Bruning, Ld., for the supply by Meister Lucius & Bruning, Ld., of 50 per cent. of the purchaser's requirements of synthetic indigo up to December 31, 1918. The purchaser agrees to take the whole of his requirements for that period from the convention, the other member of which was the German Badische concern. The other 50 per cent. was to be supplied by the Badische Co., Ld. The brands ordered

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by this contract are Meister Lucius & Bruning brands. The suspension clause runs as follows: "Strikes, breakdowns, war, fire, flood and all similar occurrences which might curtail or render impossible either the manufacture or the consumption, are regarded as force majeure and as mutually releasing either party from its obligations in respect to the time stipulated for delivery during the period of derangement." The purchaser binds himself during the currency of the contract to use no indigo but that supplied by the convention.

E. 1. This contract is dated April 4, 1911, and is made between the Calico Printers and Meister Lucius & Bruning, Ld. It is for the sale of the purchasers' total requirements in synthetic indigo during four years, estimated quantity about 1800 tons, the brands being specified as B.A.S.F. and M.L.B., that is to say, brands of the Badische German concern and of Meister Lucius. Meister Lucius & Bruning, Ld., were to be entitled to supply at least 40 per cent., and at most 60 per cent., of the total requirements. The other convention firms had a similar right. The suspensory clause was in the same form as in D., with the addition at the end of these words, "the total period of the contract being extended by a time corresponding to that during which the contract has been suspended." By a letter of the same date it appears that (except as to a small amount for experimental purposes) the buyers undertook during the currency of the contract to use only synthetic indigo manufactured by the convention firms. I note in passing, as regards this contract that it so happens that the total amount contracted for was in fact supplied. The claim under it is only in respect of rebate.

E. 2 is a contract dated July 23, 1914, between the Calico Printers on the one hand and Meister Lucius & Bruning, Ld., and the Badische Co., Ld., on the other hand. It is a contract for the sale of the Calico Printers' total requirements in synthetic indigo during the period January 1, 1915, to December 31, 1918, estimated at about 1800 tons. The brands are specified as indigo pure B.A.S.F. paste 20 per cent. and indigo M.L.B. paste 20 per cent. The price is lower than the price in E. 1, and it is provided that the new prices apply to the balance still to be taken under E. 1 on June 1, 1914. The purchasers bind themselves not to give more than 60 per cent. of their consumption in each year to any one of the convention firms, nor less than 40 per cent. to the other. The suspensory clause is the same in terms as the suspensory clause in E. 1. From a covering letter it appears that the purchasers undertook, as before, during the currency of the contract to use only synthetic indigo manufactured by the convention firms.

F. This is a contract dated June 29, 1914, and made between a group of firms or companies known as the Indigo Buying Amalgamation on the one hand and Meister Lucius & Bruning, Ld., and the Badische Co., Ld., on the other. It is a contract for sale of the purchasers' total requirements of indigo, indigo M.L.B. paste 20 per cent. and indigo pure B.A.S.F. paste 20 per cent., during the period January 1, 1915, to December 31, 1918. The suspension clause runs thus: "If from strikes, fire, flood, war, an explosion or similar unforeseen accident, the production or consumption should be diminished or rendered impossible, the vendors and buyers respectively are released from their obligation to deliver and take delivery promptly during the period of such interruption." In this case also the purchasers bound themselves during the currency of the contract to use no other synthetic indigo than that of the convention.

A. L.

clause is in the following terms: "If from fire, flood, strikes, war, an explosion or similar unforeseen accident the vendors are prevented making the colour, the contract in as far as regards time of delivery will not be binding." Immediately after the contract was signed, the Bayer Co., Ld., wrote to the British Cotton and Wool Dyers the following letter dated July 28, 1914: "We acknowledge receipt of, and thank you for, the signed contract for alizarine red, and have now much pleasure in confirming the usual terms of rebate, which are that you will be entitled to 3 per cent. calculated on the gross value on due and full completion of the contract. You are also entitled to delivery of one-tenth (12,000 lbs.) of the contract amount in the 'extra' brand at the rate for the ordinary qualities, that is to say, on completion of the contract you will be credited with a halfpenny per lb. on deliveries of 'extra brands' up to the proportion of one-tenth as previously." Alizarine red paste was a convention article. The convention included the German Bayer Co. The usual convention rebate terms were the 3 per cent. mentioned in the letter. The alizarine red paste dealt in by the Bayer Co., Ld.—that is to say, the alizarine red paste produced by the German Bayer concern—was of two qualities distinguished in fineness of filtration or brilliancy of shade and known as "ordinary brands" and "extra brands"—though the use of those words does not of itself indicate the manufacture of any particular member of the convention. The right to take one-tenth of the amount contracted for in "extra brands" at the price of the "ordinary brands" was a convention condition. The wording of the suspension clause here is the same as in the case of H. 2, and the same remarks apply. I am satisfied that in this case also the contract was a contract for German made goods, and that claims under it must fail both on the illegality point and on the frustration point.

J. 1. This contract is dated September 4, 1913, and made between Leopold Casella & Co. (a purely German concern at Frankfurt), the Bayer Co., Ld., and the Berlin Anilin Co., Ld., on the one hand, and the Bradford Dyers on the other. It is a contract for the sale of convention blues, the members of the convention being Casella's, the German Bayer concern and the Berlin Anilin Gesellschaft. Further the goods are identified by names showing them to be the products of the three German concerns. This is clearly a case of a contract for the supply of goods coming from Germany, and claims under it must fail on both points. There is a further feature of this contract which is fatal to the allowance of any claim under it. It is a joint contract by three contracting parties (one of them admittedly an enemy) with the Bradford Dyers, and a contract by the Bradford Dyers with the three jointly. Such a contract, one of the contractors being an enemy, was clearly dissolved by the outbreak of war. I was asked to read it as three separate contracts, but this I am unable to do consistently with its form and language.

NOTE II.

D. This contract is dated July 9, 1914, and is made between the executors of Thomas Welch and Meister Lucius & Bruning, Ld., for the supply by Meister Lucius & Bruning, Ld., of 50 per cent. of the purchaser's requirements of synthetic indigo up to December 31, 1918. The purchaser agrees to take the whole of his requirements for that period from the convention, the other member of which was the German Badische concern. The other 50 per cent. was to be supplied by the Badische Co., Ld. The brands ordered

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by this contract are Meister Lucius & Bruning brands. The suspension clause runs as follows: "Strikes, breakdowns, war, fire, flood and all similar occurrences which might curtail or render impossible either the manufacture or the consumption, are regarded as force majeure and as mutually releasing either party from its obligations in respect to the time stipulated for delivery during the period of derangement." The purchaser binds himself during the currency of the contract to use no indigo but that supplied by the convention.

E. 1. This contract is dated April 4, 1911, and is made between the Calico Printers and Meister Lucius & Bruning, Ld. It is for the sale of the purchasers' total requirements in synthetic indigo during four years, estimated quantity about 1800 tons, the brands being specified as B.A.S.F. and M.L.B., that is to say, brands of the Badische German concern and of Meister Lucius. Meister Lucius & Bruning, Ld., were to be entitled to supply at least 40 per cent., and at most 60 per cent., of the total requirements. The other convention firms had a similar right. The suspensory clause was in the same form as in D., with the addition at the end of these words, "the total period of the contract being extended by a time corresponding to that during which the contract has been suspended." By a letter of the same date it appears that (except as to a small amount for experimental purposes) the buyers undertook during the currency of the contract to use only synthetic indigo manufactured by the convention firms. I note in passing, as regards this contract that it so happens that the total amount contracted for was in fact supplied. The claim under it is only in respect of rebate.

E. 2 is a contract dated July 23, 1914, between the Calico Printers on the one hand and Meister Lucius & Bruning, Ld., and the Badische Co., Ld., on the other hand. It is a contract for the sale of the Calico Printers' total requirements in synthetic indigo during the period January 1, 1915, to December 31, 1918, estimated at about 1800 tons. The brands are specified as indigo pure B.A.S.F. paste 20 per cent. and indigo M.L.B. paste 20 per cent. The price is lower than the price in E. 1, and it is provided that the new prices apply to the balance still to be taken under E. 1 on June 1, 1914. The purchasers bind themselves not to give more than 60 per cent. of their consumption in each year to any one of the convention firms, nor less than 40 per cent. to the other. The suspensory clause is the same in terms as the suspensory clause in E. 1. From a covering letter it appears that the purchasers undertook, as before, during the currency of the contract to use only synthetic indigo manufactured by the convention firms.

F. This is a contract dated June 29, 1914, and made between a group of firms or companies known as the Indigo Buying Amalgamation on the one hand and Meister Lucius & Bruning, Ld., and the Badische Co., Ld., on the other. It is a contract for sale of the purchasers' total requirements of indigo, indigo M.L.B. paste 20 per cent. and indigo pure B.A.S.F. paste 20 per cent., during the period January 1, 1915, to December 31, 1918. The suspension clause runs thus: "If from strikes, fire, flood, war, an explosion or similar unforeseen accident, the production or consumption should be diminished or rendered impossible, the vendors and buyers respectively are released from their obligation to deliver and take delivery promptly during the period of such interruption." In this case also the purchasers bound themselves during the currency of the contract to use no other synthetic indigo than that of the convention.

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[1919. B. 3101.]

ASHLEY AND ANOTHER *v.* GENERAL UNION OF OPERATIVE CARPENTERS AND JOINERS.

[1919. A. 1287.]

Trade Union—Expulsion of Members—Participation in Employers' Profit-sharing Scheme—Rules of Union—Illegal Association—Directly enforcing Agreement between Members—Jurisdiction of Court—Trade Union Act, 1871 (34 *&* 35 *Vict. c.* 31), *s.* 4, *sub-s.* 1.

Sect. 4, sub-s. 1, of the Trade Union Act, 1871, provides that nothing in the Act shall enable any Court to entertain any legal proceeding instituted with the object of directly enforcing any agreement between the members of a trade union as such concerning the conditions on which any member shall or shall not employ or be employed.

The plaintiffs were members of a trade union whose rules provided (Rule 32) that it should be competent for the branch committee or other authorities there mentioned to fine or expel any member "working on a co-partnership system when such system makes provision for the operatives holding only a minority of the shares in the concern."

The trade union threatened to expel the plaintiffs on the ground that they were participants in a profit-sharing scheme, instituted by the company by whom they were employed, under which meritorious employees might become entitled to a share of profits and might invest the same in the purchase of shares in the company. This was independent of their wages, which were paid by the company at full trade union rates. In an action by the plaintiffs for an injunction to restrain the threatened expulsion:—

Held, (1.) that the jurisdiction of the Court to entertain the action was not ousted by s. 4, sub-s. 1, of the Act; and (2.) on construction of the rule that the plaintiffs were not liable to be expelled on the ground relied upon by the defendant union.

Decision of Eve J. [1921] W. N. 121 reversed.

APPEALS from the decision of Eve J. in two actions which were tried together.

The plaintiffs in the first action were three members of the Amalgamated Society of Carpenters, Cabinet Makers

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and Joiners (hereinafter called the defendant union), which was a trade union registered under the Trade Union Acts, 1871 and 1876. The plaintiffs brought the action against the defendant union and certain of its officers, claiming an injunction restraining the defendants from expelling or excluding the plaintiffs from the defendant union or from their rights or privileges as members thereof on the ground of their participation in a co-partnership scheme instituted by Lever Brothers, Ld., in whose service the plaintiffs had been continuously employed since the incorporation of the company in 1894.

On November 8, 1919, the branch of the defendant union to which the plaintiffs belonged had, in common with other branches, received a notice or instruction from a joint committee of the defendant union and the General Union of Operative Carpenters and Joiners to exclude from the defendant union all members who on and after November 14, 1919, were participating in Lever Brothers' scheme. The plaintiffs alleged that the defendants threatened and intended, unless restrained by injunction, to act on the said notice or instruction and expel the plaintiffs from the defendant union.

The plaintiffs submitted that there was no rule of the defendant union which rendered any member thereof liable to be expelled by reason of his participation in the said co-partnership scheme, and alternatively, that if there were any such rule it would be ultra vires. The defendants in their defence relied upon Rule 32 of the defendant union's rules which, so far as material, was as follows :—

(1.) "It shall be competent for any managing committee, district committee, branch committee, or branch at a special or quarterly meeting to fine (not exceeding 5*l.*) or expel any member from the society upon satisfactory proof being given that such member has refused to comply with their decision or by his conduct brought the society into discredit, wilfully violated the recognized trade rules in the district in which he is working, or working on a co-partnership system when such system makes provision for the operatives holding only a minority of the shares in the concern."

They contended that that rule constituted an agreement between the members of the defendant union as such concerning the conditions on which the members thereof for the time being should be employed, and that the plaintiffs by participating in Lever Brothers' scheme had rendered themselves liable to expulsion. At the trial the defendants took the preliminary objection that the Court had no jurisdiction to entertain the action in that the proceedings were instituted with the object of directly enforcing an agreement between members of a trade union as such concerning the conditions on which the members of the union should be employed, the jurisdiction being ousted by s. 4, sub-s. 1, of the Trade Union Act, 1871. (1)

Lever Brothers' co-partnership scheme was instituted in 1909 by Lord Leverhulme (who then held the whole of the ordinary shares in the company), and under it workmen employed by the company might obtain from the trustees of the scheme what were called Partnership Certificates, bearing dividends which were paid out of profits which would otherwise have gone to the shareholders. It was no part of the scheme that the holders of these certificates should invest the money received by them on the certificates in the purchase of shares in the company, but it was the practice of many of the workmen to do so, and thus become shareholders in Lever Brothers, Ld.

(1) The Trade Union Act, 1871, s. 4, provided: "Nothing in this Act shall enable any Court to entertain any legal proceedings instituted with the object of directly enforcing or recovering damages for the breach of any of the following agreements, namely,

(1.) Any agreement between members of a trade union as such, concerning the conditions on which any members for the time being of such trade union shall or shall not sell their goods, transact business, employ, or be employed:

(2.) Any agreement for the payment by any person of any subscription or penalty to a trade union:

(3.) Any agreement for the application of the funds of a trade union,—

(*a*) To provide benefits to members; or

(*b*) To furnish contributions to any employer or workman not a member of such trade union, in consideration of such employer or workman acting in conformity with the rules or resolutions of such trade union; or

(*c*) To discharge any fine imposed upon any person by sentence of a Court of justice. . . . ."

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Clause 9 of the scheme provided as follows: "In determining the nominal amount of a Partnership Certificate which may be issued to an employee, the trustees shall have a discretion to allot any nominal amount from 1*l.* to the maximum nominal amount specified in the Tables, provided it be a multiple of 1*l.*, and the trustees shall be guided in their determination strictly in accordance with the merits of the applicants, and without consideration of precedent or the nominal amount of any Partnership Certificate that shall have been allotted to any other applicant." The maximum amount to be allotted was, according to the Tables, proportionate to the salary or wages which the holder of the certificate was receiving from the company. The qualifications for an applicant for Partnership Certificates were determined by clause 2, which provided that every employee who should be not less than 25 years of age, be of good character, and should have a clear record of at least four years' faithful and loyal service with the company, or any of the associated companies, and who also undertook not to waste time, labour, material, or money in the discharge of his duties to the company, but to loyally and faithfully further the interests of the company, its associated companies, and his co-partners, to the best of his skill and ability, might, subject to such provisions, have issued to him from time to time Partnership Certificates upon the terms thereinafter mentioned. The workmen of the firm were graded, for purposes other than those of the scheme, as being of various degrees of merit, their merits not being founded in any way upon their output. Every employee of the firm was paid at the full trade union rate of wages. Participation in the scheme did not constitute a condition of the employment of the participant by the company. No employee of the company was bound or had any legal right to become a participant in the scheme, nor were the wages of any employee of the company in any way dependent upon his participation in the scheme.

Similar issues were raised in the second action, the defendants in that case relying upon Rule 31 of their union, which

provided as follows: "Any member proved to the satisfaction of the Executive Committee, District Committee, or Lodge to be working against the interests of the Society by working on the Premium Bonus System, or taking piecework, or sub-contracting (sub-contracting and piece work being defined as taking the labour of a job and not supplying the material), or working for either class of employer, or fixing or using work which has been made under unfair conditions or contrary to the recognized trade rules of the district in which it has been made, may be fined or expelled as the Executive Committee, District Committee, or Lodge may determine. Should any member be fined under this or any other rule where no fine is fixed, such fine not to exceed 2*l*." The defendants contended that the said co-partnership scheme was in substance a scheme under which a premium or bonus was paid in addition to wages, and therefore contravened Rule 31.

On March 16, 1921, Eve J. delivered his judgment, in the course of which he said that in the first action the issues raised led to two conclusions, one that the relevant part of Rule 32 contained a contract between members of the union concerning the conditions on which members should be employed; and the other that this action was one brought to ascertain or construe those conditions, and, if they were construed in the plaintiffs' favour, to enforce them. He did not think this was an action to which *Yorkshire Miners' Association* v. *Howden* (1); *Osborne* v. *Amalgamated Society of Railway Servants* (2); and *Kelly* v. *National Society of Operative Printers' Assistants* (3) applied. Nor was it correct to say that those cases established the general proposition that an action to restrain a trade union from acting on a resolution to expel a member was an action not dealt with by s. 4 of the Act of 1871. In each of those cases it was established by the plaintiff that the action was not brought to assert the rights of an individual to participate in the funds of the union, but to restrain a misapplication of those funds.

(1) [1905] A. C. 256. (2) [1911] 1 Ch. 540.
(3) (1915) 84 L. J. (K. B.) 2236; 31 Times L. R. 632.

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And upon that ground it was held in each case that there was nothing in s. 4 to prevent the Court from entertaining the action. In the present case the whole object of the action was to enforce the alleged rights of the plaintiffs under the agreement contained in the rules which regulated the employment of members of the union. In these circumstances he thought that the action was brought to enforce an agreement concerning the conditions of employment of members within s. 4 of the Act. In view of the decision in *Chamberlain's Wharf* v. *Smith* (1) he felt bound to hold that the action could not be maintained. For the same reasons the second action must also be dismissed.

The plaintiffs in both actions appealed.

Romer K.C. and *C. W. Turner* for the appellants.

Eve J. held that if he granted the injunction restraining expulsion, he would thereby be directly enforcing the agreement contained in Rule 32, sub-s. 1, of the Rules of the union.

[LORD STERNDALE M.R. I think we had better dispose of the preliminary point first.]

This is not an action directly or indirectly to enforce any agreement within s. 4, sub-s. 1, of the Trade Union Act, 1871. *Yorkshire Miners' Association* v. *Howden* (2) is conclusive on this point. *Chamberlain's Wharf* v. *Smith* (1) cannot now stand.

In *Rigby* v. *Connol* (3) a member of a union who was alleged to have broken a rule of the union as to apprenticeship, and had refused to pay the fine, and who had been expelled from the union on that ground, brought his action against the committee and trustees of the union claiming to be entitled to participate in its benefits, and that the defendants might be restrained from excluding him from such participation. Jessel M.R. held that to grant an injunction in that case would be to enforce directly an agreement between the members of a trade union "to provide benefits to members"

(1) [1900] 2 Ch. 605. (2) [1905] A. C. 256.
(3) (1880) 14 Ch. D. 482, 489.

within the meaning of s. 4 of the Trades Union Act, 1871, and that the action was consequently not maintainable. The dicta of Jessel M.R. in that case which went further than was necessary for its decision were dissented from by the House of Lords in *Yorkshire Miners' Association* v. *Howden*. (1) The Court will interfere to prevent the exclusion of a member of a trade union under circumstances such as prevail in the present case. *Rigby* v. *Connol* (2) was followed by *Chamberlain's Wharf* v. *Smith* (3), where the ground of the decision was that the rules merely provided for the way in which the union should carry on its business.

Lord Alverstone there regarded Rule 11 of the society's rules as governing the matter.

[LORD STERNDALE M.R. What is the agreement which Eve J. held he would be enforcing if he granted an injunction?]

The agreement in Rule 32, sub-r. 1.

[LORD STERNDALE M.R. You are not seeking to enforce that.]

No. In the *Yorkshire Miners' Case* (1) Lord Lindley refers to *Chamberlain's Wharf* v. *Smith* (3) and *Rigby* v. *Connol* (2) as being distinguishable on the ground that they were cases in which the object of the action was to enforce an agreement directly. The matter came before this Court in the second Osborne case, *Osborne* v. *Amalgamated Society of Railway Servants*. (4)

In *Steele* v. *South Wales Miners' Federation* (5) Phillimore J. said: "After the decision in *Yorkshire Miners' Association* v. *Howden* (1) in the House of Lords, I think it is very difficult to regard *Chamberlain's Wharf* v. *Smith* (3) as being good law. In *Howden's Case* (1) the plaintiff was allowed, in virtue of his proprietary interest in the funds of the union, to maintain an action to prevent their diversion to an unauthorized purpose. But if a member can get an injunction to prevent them going to an unauthorized person, surely he may equally

(1) [1905] A. C. 256.
(2) 14 Ch. D. 482.
(3) [1900] 2 Ch. 605.
(4) [1911] 1 Ch. 540.
(5) [1907] 1 K. B. 361, 370.

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get an injunction to prevent his being excluded from all share in the benefit of them, and that is what would ultimately be the result of the proposed levies if permitted to be made."

In *Osborne's Case* (1) Warrington J. had to follow *Rigby* v. *Connol* (2) and *Chamberlain's Wharf* v. *Smith*. (3) On appeal Cozens-Hardy M.R. said (4): "The real question is whether the present action is a legal proceeding, 'instituted with the object of directly enforcing or recovering damages for the breach' of an 'agreement for the application of the funds of the trade union to provide benefits to the plaintiff.' Now, apart from authority, I should answer this question in the negative," and he held that there was no reason why the mere passing of the resolution in that case should preclude the Court from giving relief.

[WARRINGTON L.J. The difficulty in this case, as in *Chamberlain's Wharf* v. *Smith* (3), is to see what was the agreement the plaintiffs were seeking to enforce.]

Even if the respondents were restrained from expelling the appellants, the latter would not thereby be enabled to obtain benefits.

[LORD STERNDALE M.R. My difficulty is to find the agreement in Rule 32.]

Smith v. *Scottish Typographical Association* (5) has really no bearing on the present case.

In *Kelly* v. *National Society of Operative Printers' Assistants* (6) a member of the defendant union brought an action for a declaration that a resolution expelling him was ultra vires and void, and for an injunction and damages, and it was held that the plaintiff having been expelled under a rule which gave no power to expel, and in respect of an offence which he had never committed, was entitled to the injunction claimed. In that case the plaintiff did the very thing which the defendants in this case contend the plaintiffs were prohibited by s. 4 of the Act from doing.

(1) [1911] 1 Ch. 540.
(2) 14 Ch. D. 482.
(3) [1900] 2 Ch. 605.
(4) [1911] 1 Ch. 554.
(5) 1919 S. C. 43.
(6) 84 L. J. (K. B.) 2236; 31 Times L. R. 632.

Jenkins K.C. and *F. Brocklehurst* for the respondents. The preliminary point is common to both appeals. The result of the authorities, as held by the House of Lords, is that an action in the nature of a representative action by a member of a trade union to restrain expulsion is not within the prohibition of s. 4 of the Act of 1871. If and when the respondents have a free hand they will maintain that the decision in *Yorkshire Miners' Association* v. *Howden* (1) does not apply to an action by a single member. The respondents contend that this is in substance a legal proceeding directly to enforce an agreement as to the conditions on which members shall employ or be employed. The question arises in this way. The plaintiffs say that they are working at Lever Brothers and are getting such benefits as the partnership certificates confer. The defendants rely on Rule 32. It is agreed that there is no rule which says that the plaintiffs shall not work under a co-partnership scheme, but the agreement in the rule is that if they do the union may either fine or expel them. *Chamberlain's Wharf* v. *Smith* (2) is exactly analogous to this case.

[LORD STERNDALE M.R. What the plaintiffs are saying is that the defendants have no right to expel them for participating in Lever Brothers' scheme. It is impossible to say that they are seeking to enforce an agreement as to conditions of employment.]

The whole dispute turns on the question of employment. The agreement the plaintiffs are seeking to enforce is an agreement to retain them as members so long as they do not work under a co-partnership scheme. That is an agreement within sub-s. 1 of s. 4 of the Act of 1871. The plaintiffs are seeking an injunction as to the terms on which they shall be employed. The Court is asked to examine certain conditions under which the plaintiffs are employed by Lever Brothers, and the real question is whether the view of the plaintiffs or that of the defendant union is correct.

The House of Lords did not overrule *Chamberlain's Wharf* v. *Smith* (2), which is a direct authority in the respondents'

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favour. That decision stands and has never been unfavourably criticised. The action there was with reference to a condition on which the defendants were to sell their goods and was dismissed.

Here the Court is asked to adjudicate upon the effect of an agreement. If there were no rule dealing with employment the respondents might be in a difficulty, but there is such a rule, Rule 32, sub-r. 1. Regard must be had to the evil which the Act was passed to remedy. The House of Lords have never yet considered s. 4, sub-s. 1, of the Act of 1871. Can it make any difference that there is no rule that the plaintiffs shall not work on a co-partnership scheme? "Directly enforcing" an agreement, it is submitted, means inviting the Court to consider the contract that is relevant to the dispute between the parties, and to adjudicate upon it. The Court is asked to look at the contract from both sides and has to determine the meaning of the particular rule, Rule 32.

[LORD STERNDALE M.R. The suggested agreement in the present case is not as to conditions of employment, but as to conditions of membership.]

It is submitted it is both. The two things are not necessarily exclusive. Every rule is part of the conditions of membership. It is a narrow view that an agreement which ex concessis is an agreement between the members inter se, and which specifies and treats a certain mode of employment as misconduct, is not an agreement concerning the conditions of employment. It is impossible to say that the rule does not concern employment.

Osborne v. *Amalgamated Society of Railway Servants* (1), *Rigby* v. *Connol* (2), is good law, but we are not concerned with that, because sub-s. 3 of s. 4 is not relied on here.

The question is whether this is an action for directly enforcing this agreement.

Chamberlain's Wharf v. *Smith* (3) has never been dissented from, and has been treated as binding in *Osborne's Case.* (1)

Apart from authority, and looking at the substance of

(1) [1911] 1 Ch. 540. (2) 14 Ch. D. 482.
(3) [1900] 2 Ch. 605.

the action, it is an action to enforce Rule 32, sub-r. 1. The plaintiffs under the guise of this action are seeking in effect to enforce their own view of the terms of an agreement concerning the conditions of their employment.

P. M. Walters (*Jenkins K.C.* with him) for the respondents in *Ashley* v. *General Union of Operative Carpenters and Joiners*.

Romer K.C. in reply upon the preliminary question.

[LORD STERNDALE M.R. We think the appeal succeeds upon this point, but before giving judgment we will hear the appeals on their merits.]

Counsel were then heard upon the point whether in the first case the plaintiffs by participating in Lever Brothers' scheme were "working on a co-partnership system when such system makes provision for the operatives holding only a minority of the shares in the concern" within Rule 32 of the defendant union's rules; and whether the plaintiffs in the second case were "working on the premium bonus system" within Rule 31 of the defendants' rules.

Cur. adv. vult.

June 13. LORD STERNDALE M.R. Two questions arise for decision on these appeals, one of jurisdiction, and the other as to the construction of the rules of the defendant trade unions. It has been admitted throughout that the defendant society in each case is an illegal society in the sense that it is in restraint of trade, and that, therefore, it comes within the provisions of the Trade Union Act of 1871, and the decisions as to the powers of the Court in respect of such societies.

The question of jurisdiction was decided by the learned judge in favour of the defendants. He held that he had no power to deal with the matter at all, and, therefore, the second question, which turns upon the facts and the construction of the rules of the two societies, although discussed before him, was not decided by him. The question of jurisdiction depends upon whether the plaintiffs are seeking to enforce an agreement by the defendants within s. 4, sub-s. 1, of the Trade Union Act, 1871. The only agreement within s. 4

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which has been suggested to us is an agreement under sub-s. 1. [The Master of the Rolls read the sub-section and continued :] It is the last part of the sub-section which is said to apply to this case. Therefore, in order to deprive the Court of that jurisdiction, it must be shown that the legal proceeding instituted by the plaintiffs is a proceeding with the object of directly enforcing an agreement concerning the conditions on which they were to be employed. I think it is of first importance to remember, and, I am speaking with the greatest respect, I do not think it has always been quite sufficiently stated in some of the cases that it must be a legal proceeding to enforce the agreement by the defendants—by the society. Sometimes it has been treated as though the plaintiffs were trying to enforce an agreement by themselves. That I do not think is the proper reading ; it must be to enforce an agreement by themselves with the defendants, but to enforce that part of it which is to be performed by the defendants. I think, therefore, it is necessary to see what the action is with which we have to deal in this case. [The Master of the Rolls described the nature of the action and continued :] The defendants justify what they intend to do under Rule 32, sub-r. 1, of the rules of the defendant union. The question is, is this an action to enforce an agreement concerning the conditions on which the members shall be employed within s. 4, sub-s. 1, of the Trade Union Act, 1871 ? The plaintiffs do not question the validity of the rule ; they say that they have done nothing in contravention of it. It must be remembered that not all agreements made by trades unions which come under the description of illegal associations because they are in restraint of trade, are unenforceable ; only such agreements as come within s. 4 of the Act. It must be an attempt to enforce an agreement by which the defendants agree to do something. Where is such an agreement to be found in these rules ? [His Lordship read Rule 32 and continued :] It will be noticed that that rule deals with several grounds of expulsion, the last being the only one which refers to the question of employment. Where is there any agreement by the defendant union to do anything in that rule ? I

think there is no express agreement by the defendants in the rule at all, and that the only agreement by the defendants is the implied agreement which arises from membership. There must be implied on the part of the member when he joins the trade union an agreement that he will obey and comply with the rules, and on the part of the defendant union an agreement that, so long as the member complies with the rules and makes his contributions according to the rules, and so long as he does not do anything in violation of the rules, he shall remain a member. I think probably such an agreement as that may be inferred from the fact of the acceptance of him as a member, but that is an agreement as to membership, and the conditions of membership; it is not an agreement as to the conditions on which he is to be employed, and the fact that one of the grounds on which the trade union makes a rule, for breach of which they claim a right to expel him, has something to do with the employment, does not make it an agreement to be performed by them as to the terms and conditions upon which he is to be employed. I was anxious to get a statement of what the defendants allege the agreement to be performed by them which the plaintiffs were trying to enforce, and counsel said: The plaintiffs are seeking to enforce the following agreement: We will allow you to remain a member provided you do not work on a co-partnership system such as is described in Rule 32, sub-r. 1. In the first place, that is not the agreement; there is no such agreement to be found anywhere, and the defendants would be the very last persons to assent to their having made such an agreement, because in addition to the working of a co-partnership system such as is described in the rule, they have expressly taken power to expel him on a great number of other grounds. Therefore I say they would be the first persons to repudiate an agreement by which they undertook not to exclude him so long as he did not work upon this kind of co-partnership system; and in any event, if such an agreement did exist, it is not an agreement to be performed by them respecting the conditions and terms upon which he is to be employed. It is an agreement to be

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performed by them, because they have admitted him as a member, and the obligation upon them, if there be an obligation, arises from that condition of membership and not from any agreement as to the conditions upon which he is to be employed. That seems to me to be the answer, looking at the matter apart from authority, to the defendants' contention. The defendants have never made any agreement at all with regard to the conditions upon which the man is to be employed, but they have made it a condition of membership that he shall not commit a breach of any of the rules. Apart from authority I do not think anybody would say that there is any agreement to be performed by the defendants at all contained in this rule except such as arises in the general way from membership.

But there is authority with which it is necessary to deal. The first case always referred to upon a question of this nature is *Rigby* v. *Connol* (1), and there is a Scottish case to the same effect: *Aitken* v. *Associated Carpenters and Joiners.* (2) Those are cases of very great authority, because of the eminence of the judges who decided them. *Rigby* v. *Connol* (1) has been approved in several cases on the ground of the decision being that the plaintiffs were claiming not only an injunction to restrain expulsion, but they were also asking for an enforcement of their rights as members to benefits under the rules of the union. But Sir George Jessel went further than he need have done in that case. He held that as membership gave a right to a share in the funds of the union, and expulsion from the union would deprive the expelled members of that right, an action to restore them to membership was an action to enforce their claim to a share of the property. If the latter part of that holding, which was not necessary for the decision, were still good law, it would of course cover this case. But in this Court, at any rate, that contention cannot be maintained, and for this reason: that this Court has held that wide principle so enunciated by Sir George Jessel to be not good law, and the tersest and clearest ground upon which it has been held

(1) 14 Ch. D. 482. (2) (1885) 12 R. 1206; 22 S. L. R. 796.

to be not good law is thus stated by Buckley L.J. in *Osborne* v. *Amalgamated Society of Railway Servants* (1): "It is said that an order to declare his expulsion ultra vires and a proper consequential injunction will be an enforcement of the agreement in the rules to apply the funds to provide him with benefits. I cannot follow the contention. The plaintiff was a member of a society with (amongst others) rights as regards those benefits which were unenforceable. How can an order to restore him to membership do more than make him what he was before, namely, a member with the same unenforceable rights? How does such an order enforce those rights? What benefit in the application of the funds is it that the order compels the society to give him? Obviously none. If he succeeds in the action he merely resumes the position in which he stood before. His rights by way of benefit are neither greater nor less than before his expulsion. The whole answer to the contention on this part of this case may be summarised in a sentence. An order to restore to membership with unenforceable rights is no order to enforce those rights." That states the ground upon which the general principle enunciated by Sir George Jessel in *Rigby* v. *Connol* (2) has been rejected by the Courts. Therefore we come back to this: Is this an action to enforce an agreement, within s. 4, sub-s. 1, as to the terms upon which the plaintiffs are to be employed, and to enforce the performance of the agreement by the defendants? It is said that *Chamberlain's Wharf* v. *Smith* (3) governs this case and shows that it is such an action. It does not seem to me, with the greatest respect to those learned judges who decided it, to be an authority of that kind at all. So far as it enunciated any principle we are bound to follow it; but we are not bound to follow the decision on the facts in a case where the facts are different. There was enunciated in that case a principle which nobody can dispute—namely, that an action to enforce an agreement coming within s. 4 of the Trade Union Act of 1871 cannot be

(1) [1911] 2 Ch. 540, 567. (2) 14 Ch. D. 482.
(3) [1900] 2 Ch. 605.

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maintained. That is the only principle enunciated by that case, and it has never been disputed. The Court, or at any rate, one member of the Court, did find there an agreement within s. 4, sub-s. 1, as to the terms upon which persons were to sell their goods, and did hold on that ground that the action could not be maintained. I say one of them, because all the three learned judges, Lord Alverstone, Rigby and Collins L.JJ., did not give the same ground for their judgment. Collins L.J. seems to me to found his judgment entirely upon the principle now held to be erroneous, enunciated by Sir George Jessel in *Rigby* v. *Connol* (1); Rigby L.J. upon grounds which I think are wider than could be upheld. Lord Alverstone, with some hesitation, put it upon the ground that it was an action to enforce an agreement such as I have already mentioned. The real meaning of that decision is I think well expressed by Fletcher Moulton L.J. in *Osborne* v. *Amalgamated Society of Railway Servants* (2), which has been held to be rightly decided. He said: "In the case of *Chamberlain's Wharf* v. *Smith* (3) the plaintiff company had been a member of a voluntary association called the Tea Clearing House, the members of which were dock companies and tea warehouse keepers. Its object was to compel its members to charge certain scheduled rates on teas and no other, and, indeed, the whole of the rules were directed towards securing this. It would not be too much to say that the whole agreement of membership might be aptly described in the words of s. 4, sub-s. 1, as an 'agreement between members of a trade union as such, concerning the conditions on which any members for the time being of such trade union shall or shall not sell their goods, transact business, employ, or be employed.'" Therefore he holds that the whole agreement was nothing else than an agreement within s. 4, sub-s. 1. Nobody can say that of the rules in this case; they refer to a very great number of things which have nothing whatever to do with the terms upon which the members of the union are to be employed. I

(1) 14 Ch. D. 482. (2) [1911] 1 Ch. 540, 563.
(3) [1900] 2 Ch. 605.

think that is the ground upon which Lord Alverstone's judgment proceeded. I do not consider that an authority which governs this case, and for this obvious reason: it turns, as stated by Fletcher Moulton L.J., entirely upon the fact that the whole object of the agreement was to govern the relations of the members as to the conditions upon which they were to buy and sell their goods, and, therefore, that to try and enforce any one of the rules was to try and enforce an agreement which fell within s. 4. The rules here are quite different, and a case which turns upon the inference drawn by one Court as to the effect of certain rules cannot possibly be an authority binding another Court to infer a different agreement from a different set of rules. Therefore, I do not think there is any authority that binds us to say that there is here such an agreement by the defendants as is alleged which the plaintiffs are seeking to enforce, when it seems to me perfectly clear upon the rules that no such agreement exists and that there is no attempt to enforce such an agreement. I think, therefore, with the greatest respect to the learned judge that his decision that the Court could not entertain the action was not correct. I think the Court can entertain it, because it is not an action to enforce any agreement between members of the trade union as such concerning the conditions upon which any members for the time being of such trade union shall or shall not be employed.

That makes it necessary to see whether what the plaintiffs in these cases have done is something which gives a right to expel them under this Rule 32. What the plaintiffs have done is that they have been working at Messrs. Lever Brothers, and they have been taking the benefit of what is called the Lever Scheme of Co-partnership. What I am going to decide is simply the question whether this rule does give, in the circumstances, a right to expel the plaintiffs, and in considering that it must not be forgotten that this is a penal rule, and it has sometimes been said that penal sections of statutes and penal rules must be construed strictly. I do not think that means that in order to avoid the infliction of particular penalties fixed by the section or rules the Court

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must twist the words so as to allow the person affected to escape; it certainly does not mean that. I think it may be taken that the Court must find in a section or rule of that kind the intention clearly expressed, and must not be astute to construe the rules so as to bring any person within them. Having said that, I propose to examine very shortly what this so-called Lever Co-partnership scheme is. The workmen employed by Messrs. Lever Brothers are employed, as I understand, on full trade union wages, for not more than trade union hours, except so far as the trade union allows overtime, and there the contractual obligation between them and their employers ends. They have no right to demand anything else; but a scheme was introduced by Lord Leverhulme which is roughly to this effect: That the workmen employed at Lever Brothers who are meritorious workmen, to use a compendious expression, can obtain not as of right, but have a chance of obtaining from a body of persons called the trustees, who are also the directors of the company, what are called Partnership Certificates, which bear dividends. No part of the scheme involves the money which the holders receive upon the certificates being invested in shares of the company. A practice has grown up for the workmen to employ what they receive upon the certificates in taking shares. They are permitted, but have no right to do so, and, therefore, a good many of the workmen are shareholders in Lever Brothers. I am dealing with the scheme as though it were a scheme of the company, although it is stated as being a scheme of Lord Leverhulme's, who was at that time, and I have no doubt is now, the holder of the majority of the ordinary shares, and had a certain amount of jurisdiction, if I may call it so, over the terms of the scheme; but I am treating it as a scheme of the company, because the company have altered their articles for the purpose of giving effect to it. That, I think, represents fairly, although not fully, the object of the scheme and the way in which it is worked. [His Lordship then read clauses 2 and 9 of the scheme and continued:] Therefore, whether the workmen get certificates or not depends upon their merits. They are, not for the purpose of

the scheme, but otherwise, graded as being of various degrees of merit, and no doubt their merits are judged by, amongst other things, the way in which they have worked; but the merits are in no way founded upon output, and that was most distinctly stated: Output has nothing to do with it, and a very quick worker who has a greater output does not get, under those circumstances, any greater benefit under the scheme than a man who is a slow worker and has a smaller output, but no doubt general merits, including steadiness and so on, are taken into account in considering their applications for certificates. That is the nature of the scheme. The question is whether that scheme is such that workmen participating in it, and accepting its benefits, are "working on a co-partnership system when such system makes provision for the operatives holding only a minority of the shares in the concern." The first question is whether it is a co-partnership. Everybody concerned with it calls it a co-partnership, and there is no definition to which we have been referred which brings to my mind clearly what a co-partnership is. I think one thing is quite clear, that the definition of a co-partnership for the purposes of these rules is not the same as a strict definition of a co-partnership in the ordinary sense of the word. It is not necessary, to make it a co-partnership scheme within the meaning of these rules, that it should possess all the incidents of a legal partnership as defined by the Acts of Parliament which govern partnerships. What it does mean, as a matter of strict and clear definition, I doubt if anybody knows. We have been referred to a book by a well-known writer on labour subjects, Mr. Cole, and to a report by somebody in the Statistical Department of the Ministry of Labour, but neither of those works, of course, is binding upon us, though they are valuable for getting a clear definition of co-partnership in the sense of what is called a co-partnership scheme. The word is used, as a good many words are used at the present day, by people without having in their own minds any very clear idea of what they mean, and, therefore, it has to be interpreted in a somewhat liberal and loose manner; and considering that everybody concerned

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with this scheme calls it a co-partnership, I am not prepared to say that it is not. But that is only one step on the way. With regard to this question of definition, I must reject one argument that was addressed to us, that because words are loose and have no particular strictly defined meaning, therefore they must be interpreted as the draftsman of the rules intended they should be. That argument seems to me to be contrary to every principle of construction, of any kind of document. But another method of interpretation was suggested—namely, that under the rules the meaning of any rule which is not quite clear is to be interpreted by the executive committee, and if the executive committee decide upon the meaning of the rule, their decision is conclusive. If there were such a rule I am by no means convinced that a decision under it would be binding upon the Court; but it seems to me that the conclusive answer to that argument is that there is no evidence before us that any such decision was ever arrived at by the executive committee, although no doubt their action shows that they did construe Rule 32 as affecting the present case. But the answer that is equally conclusive before we get to that point is that Rule 4, sub-r. 7, upon which this is founded, has no such meaning as is contended for. Rule 4 is a rule governing the branch meetings, and sub-r. 7 provides that should any case arise upon which rules are silent and not quite clearly defined, it shall be sent by the branch or branch meeting who cannot interpret it to the executive committee for their decision, and be published in the monthly journal as a guide to other branches, such decision to be inserted in the minute book of each branch. It is manifest that r. 4, with its sub-rules, is merely a rule for internal administration of the unions, and for the convenience and guidance of branches when they come to deal with the rules; if they are not certain about a rule or if it is silent they are to apply to the executive committee, who are to give them a decision upon which they and other branches are to act, and it has not the effect which is contended for at all. The result is that there is very little to guide us beyond the words of the rule itself. The whole of

the words must be considered : " When the member is working on a co-partnership system when such system makes provision for the operatives holding only a minority of the shares in the concern." Whether they are working on a system of co-partnership or not is, I think, very doubtful. It seems to me this rule clearly contemplates a system of co-partnership which involves the taking by the workmen of shares in the concern. It is directed against a system by which the workmen become partners without having a control over the working of the firm in which they are partners. In my opinion this scheme does not necessarily involve the taking of any shares in the company, although in practice workmen who are under it do take shares, nor does it involve any provision that the workmen are to hold the minority of the shares. It is true that they do hold the minority, and unless great alterations are made in the scheme, the probability is they always will ; but there is no provision in the scheme to that effect. The result therefore is that the plaintiffs are right in saying that they have not committed a breach of the rule, and an injunction should be granted to restrain the defendants from acting upon the threat to expel them from the union. I do not think it should go in the form in which it is asked for—namely, or for any other cause ; there may be other causes quite well established when matters come to be investigated by the officials of the union, and, therefore, I think the injunction should be confined to restraining the defendants from acting upon the notice which they have given and which I have already read.

The second case raises the same point as to jurisdiction, but turns upon a different set of rules. [His Lordship read Rule 31 of the defendant union and continued :] It is said that the plaintiffs are " working on a premium bonus system," because they are participating in the Lever Scheme. We have had some definitions of premium bonus systems given to us, one from the Oxford Dictionary, and those definitions distinctly exclude such a transaction as this. The Lever Co-partnership Trust cannot rightly be said to be a premium bonus system. I think, therefore, the decision upon the

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second case must be the same as in the first, and again the injunction must be limited to the threat at present made; it cannot extend to any other ground of expulsion.

WARRINGTON L.J. The plaintiffs in each of these two cases are members of the defendant trade union. The object of each of the actions is to prevent the defendant union from carrying into effect a threat to exclude the plaintiffs from the union on the ground that they are participants in what is called the Co-partnership Trust of Lever Bros., Ld., and as such entitled to shares in the profits of that company.

In each case the defendants rely on the preliminary objection, that having regard to the provisions of the Trade Union Act, 1871, the Court cannot entertain the action. To this objection Eve J. has given effect, and without discussing the merits has dismissed the action. For the purpose of this objection there is no substantial distinction between the two actions. For the sake of simplicity I propose to deal with Braithwaite's case alone. I will assume that at common law the union is an illegal association, its purposes being in restraint of trade, and that but for the Act neither the agreement for association itself nor any provision thereof could be enforced by legal proceedings.

The material parts of the Act are as follows. [His Lordship read ss. 3 and 4 and continued:] It is said that the action has been instituted for the purpose of directly enforcing an agreement between the members of the trade union as such concerning the conditions on which any members for the time being thereof shall or shall not be employed.

The only material rule is Rule 32, sub-r. 1. [His Lordship read it and continued:] It is said that in this rule is contained an agreement concerning the conditions upon which the members shall or shall not be employed, and that the object of the action is directly to enforce this agreement.

It was said by Lord Macnaghten in *Yorkshire Miners' Association* v. *Howden* (1): "The difficulty, such as it is, is found in the Act of 1871. But the difficulty, if I may

(1) [1905] A. C. 256, 263.

presume to say so, is, I think, not so much in the language of the Act as in the language of the learned judges who have expounded it. The commentaries are in fault rather than the text," and with great respect I venture to express my hearty agreement with this statement.

I therefore look at the Act and consider the object of the present proceedings to see whether the object excludes the proceedings from the jurisdiction of the Court. By s. 3 the Act removes from trade unions the quality of unlawfulness rendering void the agreement between the members, and if there had been nothing more it would thereby have enabled the Court to entertain proceedings the object of which was to enforce any such agreement, but this is qualified by the provisions of s. 4: "The Act proposes only to strike at certain agreements, leaving, at least apparently, the jurisdiction of the Court untouched as to everything else." The last sentence is taken from the speech of Lord Macnaghten in *Howden's Case*. (1) What then is the object of these proceedings, and are they such as are struck at by s. 4, sub-s. 1? The object is to prevent a breach by the defendants of the agreement under which the plaintiffs are now, and, until it is lawfully determined, are entitled to continue, members of the union. To enforce this does not, in my opinion, enforce any of the agreements between the members concerning conditions of employment; the plaintiffs, if we grant the relief asked, remain members of the union, but any agreements such as are described in s. 4, sub-s. 1, remain, after our judgment, unenforced and unenforceable, exactly as they were before such a judgment was pronounced. But it is said that Rule 32, sub-r. 1, itself contains such an agreement, and that by restraining the defendants from resorting to expulsion we should be enforcing it. I fail to find any such agreement. The member does not, under this rule, agree to do or not to do anything. At the most he agrees to render himself liable to expulsion if he does or does not do certain things therein specified, and all that we are asked to do is to say that he has not done one of the specified things. The

(1) [1905] A. C. 266.

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defendants enter into no agreement beyond that which may be involved in the acceptance of the plaintiffs as members of the union. I am of opinion, therefore, independently of authority, that the Court has jurisdiction to entertain the proceedings, and that the judgment of Eve J., which was confined to this point, was incorrect.

I may venture to express the opinion that if the law were otherwise it would be disastrous to members of trade unions, as it would leave them and their capacity to earn a livelihood at their trade entirely at the mercy of the dominating section for the time being, without any possibility of relief at the hands of the Court against an expulsion which might be clearly unjustifiable by any rule.

I now turn to the authorities to see whether there is any decision binding on us which prevents us from acting on the view I have expressed.

Two cases are mainly relied upon, *Rigby* v. *Connol* (1) and *Chamberlain's Wharf* v. *Smith*. (2) As to *Rigby* v. *Connol* (1), the object of the action as evidenced by the statement of claim was to enforce an agreement for the application of the funds of the union to provide benefits to members, for the plaintiff asked for an injunction restraining the defendants from excluding him from participation in those benefits. Such an injunction, though negative in form, is in substance an order directing the defendants to allow the plaintiff to participate. For this reason the case is clearly distinguishable. The judgment of the Master of the Rolls contains expressions going beyond what was necessary for the decision; this part has received criticism from higher authority than myself, and I say nothing about it. In *Chamberlain's Wharf* v. *Smith* (2) Lord Alverstone M.R. succeeded in finding in what he regarded as the essence of the agreement of membership itself, an agreement concerning the conditions on which the members should transact business, and, therefore, concluded that to enforce the agreement of membership was to enforce an agreement within s. 4, sub-s. 1. The explanation of that case is given by Fletcher Moulton L.J. in *Osborne* v.

(1) 14 Ch. D. 482. (2) [1900] 2 Ch. 605.

Amalgamated Society of Railway Servants (1) in the passage already read by the Master of the Rolls. So understood, the case is, in my opinion, distinguishable from the present, in which, as I have said, I can find no such agreement. I cannot, however, part with the case without saying that having read with care the judgment of Rigby L.J. and the general expressions used by him therein, I do not think he could have said what he did had the speech of Lord Macnaghten in *Howden's Case* (2) been delivered. In my opinion, therefore, there is no authority binding on us which prevents me from coming to the conclusion at which I have arrived. On the contrary, I think my view is supported by *Osborne* v. *Amalgamated Society of Railway Servants* (1), and particularly by the following passages in the judgment of Fletcher Moulton L.J. (3), which I think it is useful to read: "Now Trade Unions and their members are, as I have said, in as good a position in all respects as other societies and their members, except as regards the enforcement of contracts, and there only if the contract which is sought to be enforced comes within one of the excepted classes. The contract of membership is the contract which the plaintiff seeks here to enforce. He says that he has been admitted to membership and has performed all conditions for his continuance therein. This is not denied for the purposes of to-day. But the defendants say that this demand for reinstatement is a legal proceeding instituted with the object of directly enforcing an agreement for the application of the funds of the trade union to provide benefits for members. If they are wrong in this, the appeal must be allowed and the action go to trial on the facts. To test this, let us assume that the relief is granted, and that the plaintiff is declared a member of the trade union. Will the effect of that be to enforce an agreement for the application of the funds of the trade union to provide benefits for him? The only possible answer to this question is 'Certainly not.' By the statute that is the very thing which his membership does not entitle a man to do, and therefore

(1) [1911] 1 Ch. 540, 563. (2) [1905] A. C. 266.
(3) [1911] 1 Ch. 559.

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declaring him a member simpliciter not only does not directly enforce an agreement for the application of funds for his benefit, but does not even help him in any future proceeding to enforce any such agreement. It seems to me to be a logical contradiction to say that to put a man in a position where he cannot enforce a particular agreement is enforcing it. All that the Court is asked to do here is to declare that the plaintiff is entitled to the performance of the agreement to accept and to keep him as member, and inasmuch as this is not in itself an application of the funds of the trade union to provide benefits for a member and does not even enable the plaintiff by subsequent proceedings to enforce any agreement so to apply them, the subject-matter of this action appears to me to be entirely outside the excepted classes enumerated in s. 4." There is one other short passage in the judgment of Buckley L.J. to the same effect, where he says (1): "There are, in my opinion, no words in s. 4 of the Act of 1871 which prevent this Court from entertaining an action in which no larger remedy is sought than an order to restore the plaintiff to the contractual rights flowing from membership, including all such (if any) benefits flowing therefrom as he enjoyed before his expulsion." Now except that in that case the agreement in question fell under the third head of s. 4, the remarks made in those passages which I have read are exactly applicable to the present case.

The preliminary objection then being out of the way I now turn to the rule to see whether the plaintiffs are working on such a co-partnership system as is there described.

Inasmuch as the rule imposes the penalty of expulsion, it seems to me that it is incumbent on the defendants to show that the plaintiffs are doing that which is clearly within the rules. The plaintiffs are employed by Lever Brothers, and the terms of their employment as regards wages, hours, the nature of the work they have to do and so forth, are all strictly in accordance with the trade union rules. But having satisfied the necessary conditions as to length of service and otherwise, they applied for, and obtained, admission to

(1) [1911] 1 Ch. 570.

participate in the co-partnership trust already referred to. They had no right to be so admitted as one of the terms of their contracts of employment, and if admission had been refused they could not have compelled the trustees to grant it by any legal proceedings.

The substance of the trust and the scheme attached to it is that the participants received what are called partnership certificates, and these entitle the holder to a share in the ultimate surplus of the company's profits payable to the holder or holders of the ordinary shares. They are also at liberty, if they please, to invest such share of profits in 5 per cent. Cumulative Preference Ordinary shares, and if they do so they obtain, as holders of such shares, a further right of participation in profits.

Now I agree that the expression " co-partnership " in the rule in question is not to be interpreted by reference to rules governing the question whether at law a partnership in the strict sense exists. But in order to bring the plaintiffs within the rule the defendants must make out that they are working on a co-partnership system. This, in my opinion, they fail to do. The evidence satisfies me that they are working on a plain time wage system, and nothing else. The rule points, in my judgment, to cases in which the co-partnership is of the substance of the contract of employment. This is not the case here, and even if it were the co-partnership makes no provision for the operatives holding a minority of the shares in the concern. I am, therefore, of opinion that the ground for expulsion alleged by the defendants is an insufficient ground, and that they ought to be restrained from acting on it.

In *Ashley's Case* there is nothing, so far as the preliminary objection is concerned, to distinguish it from *Braithwaite's Case*. On the merits it is weaker than *Braithwaite's Case*, inasmuch as Rule 31, dealing with expulsion, refers to, as one of the grounds of expulsion " working on the premium bonus system," which I think means a system under which some form of payment by results is made. With all respect to the arguments addressed to us, there is no pretence for saying that the Lever Trust involves in any form payment by results.

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YOUNGER L.J. The preliminary contention which each of the two trades unions concerned in these actions here puts forward—namely, that the Union is entitled to have withdrawn altogether from the cognisance and jurisdiction of any court of justice the determination of the question whether there is any warrant at all under its rules for the expulsion of its plaintiff members from its ranks—is one so wide reaching in its effect as to invest these proceedings with an importance to all trade unionists that can hardly be exaggerated. Expulsion from their unions of convinced trade unionists, as all these plaintiffs are said to be, is in these days of nationally organized labour no light thing. Mr. Stevenson, a representative of one of the unions concerned, described at an interview before action what such exclusion involved to a man in the position of the plaintiffs. "Naturally he would become a non-unionist, and other members of our association will not work with non-unionists. That is the position." In other words he would be in danger of becoming what Lord Moulton in another connection once described as an odd lot in the labour world. It is hardly too much to say that to such men as the plaintiffs expulsion from their union is little less than a sentence of industrial death.

But in two cases, one before Sir George Jessel, the other in the Court of Appeal, even a wrongly expelled member of a trade union has been held to be without redress in the Courts. Eve J. has considered himself bound so to hold here. The first great question, accordingly, that has to be determined is whether the contention of these defendant unions, up to a point as it is, supported by authority, can be successfully maintained in the circumstances of these cases, it being assumed for the purpose of the discussion, but of course for that purpose only, that the threatened expulsion is without warrant from the rules of either union.

The reasonableness of the contention, in the comprehensive form in which it is put, is, in these actions, put to a severe test.

Each of the three plaintiffs in the first action has for many years been a member, and at least one of them has been a

prominent and active member of his defendant union. The same is true of the plaintiff in the second action. Against no one of these men is any complaint or suggestion of disloyalty to his fellows at any crisis or conflict in his union's history made or suggested, and any reflection upon the personal character or upon the competence as skilled workers of any of the plaintiffs is, it is superfluous to add, quite out of the case. Moreover each one of the plaintiffs remains, as we were told by Mr. Romer, a convinced upholder of the principles long maintained and still held by both unions, as alone proper for fixing the remuneration of a worker engaged in the industry concerned, while the alleged departure on his part from these principles now said to be so serious as to justify expulsion—participation in Messrs. Lever Brothers' so-called co-partnership scheme—was made by each of the plaintiffs many years ago, each of them, without complaint by any one concerned in either union, having been a participant in the scheme from the date of its establishment over ten years since. Add to this, that the plaintiffs are, all of them after prolonged membership, and in consideration of regular contributions to their union funds, now in expectation of substantial benefit therefrom more or less immediate, all of which is sacrificed by their expulsion. It is with reference to members of that quality and standing that the defendant unions having through their respective governing bodies decided to expel the plaintiffs, now raise the contention that even if the rule of the union on which the executive professed to act does not on any sound or even possible construction warrant their action the plaintiffs are left without remedy or redress in respect of it, either before the Courts or at all. Is this far-reaching contention correct? That is the first question.

The complaint made against the plaintiffs, as I have said, is that they are each of them participants in Messrs. Lever Brothers, Ld.'s co-partnership scheme. It is alleged by the union defendant to the first action—the Amalgamated Society of Carpenters, Cabinet Makers and Joiners—that by virtue of such participation each of the plaintiffs in that action is

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within the meaning of Rule 32 of the union "working on a co-partnership system when such system makes provision for the operatives holding only a minority of the shares in the concern," and is under that rule liable to expulsion for the offence: it is alleged by the union defendant to the second action—The General Union of Operative Carpenters and Joiners—that by virtue of the same participation the plaintiff Ashley is, within the meaning of Rule 31 of its rules, "working against the interests of the society by working on the premium bonus system," and is under that rule liable to expulsion for the offence.

Upon intimation made on behalf of both unions in November, 1919: "That any member or members in the employ of Messrs. Lever Brothers, Ld., who are participating in their co-partnership scheme on and after November 14, 1919, must be excluded from the Societies in accordance with General Rules," these two actions were, on November 20, 1919, commenced, and in each an injunction is asked "restraining the defendants and each of them and their and each of their officers servants and agents from expelling or excluding the plaintiffs or any of them from the defendant Union or from their rights or privileges as members thereof, on the ground of their participation in the said co-partnership scheme of Lever Brothers, Ld., or on any other ground, and from taking or continuing and from directing or permitting or suffering to be taken or continued any steps with a view to effecting any such expulsion or exclusion."

To that claim the first defence put forward, as the learned judge has phrased it, is "that the Court has no jurisdiction to entertain the action, in that it is a proceeding instituted with the object of directly enforcing an agreement between members of a trade union concerning the conditions upon which members of the union are to be employed; in other words, the defendants assert that the jurisdiction of the Court is ousted under sub-s. 1 of s. 4 of the Trade Union Act, 1871."

These are the circumstances in which this question is now raised, and upon the question so raised this Court—it may

be every Court—finds itself in a position of embarrassment, not so much from any difficulty in applying the words of the statute to the facts of these two cases, as from the difficulty of ascertaining how far in view of previous decisions upon the effect of the Act the Court is free to attribute to its words an interpretation which, apart from these decisions, they would, as applied to these actions, appear clearly enough to bear. The passage already read by Warrington L.J. from Lord Macnaghten's speech in *Howden's Case* (1), decided as long ago as 1905, has not become less forcible as a result of that decision and others which have succeeded it. The observations there made are still, in my judgment, strictly true of the difficulty which has now to be solved.

Now what are the two actions with which we are here concerned ?

I have already set forth the relief claimed in each of them and the circumstances in which they were commenced. In each statement of claim reference is made to the plaintiffs' membership of the defendant trade union, to the plaintiffs' participation in the Lever co-partnership scheme, the nature of which, as the plaintiffs see it, is then set forth, and the allegation is made that there is no rule of the defendant union which renders any member thereof liable to be excluded or expelled from that union by reason of his participation in such a scheme, and an injunction is asked for in the terms already stated.

It appears to me to be in no way difficult to describe in brief, but sufficiently adequate and accurate, terms the object of the actions thus instituted and summarised. The object of each action seems to me to be to protect the status and right of property vested in each of the plaintiffs as a member of his defendant union and to safeguard those other privileges of membership of which he alleges he is threatened with unjust deprivation by illegal expulsion from the union. And if that be the real purpose and object of both actions, then it is conceded by counsel for the respondents that before

(1) [1905] A. C. 256.

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every tribunal, short of the House of Lords, he must now admit that the Court is in no way prevented by the statute from entertaining them. Accordingly I say no more, either of the authorities or otherwise, on this branch of the subject.

But counsel for the unions contends that in this Court at least he has the support of leading authority for the proposition that each of these actions in real substance—he does not, I think, venture to suggest that either action is so in point of form—is within the meaning of s. 4, sub-s. 1, of the Trade Union Act, 1871, a legal proceeding instituted with the object of directly enforcing an agreement—namely, Rule 32 in the first action, and Rule 31 in the second—between members of a trade union as such concerning the conditions on which any members for the time being of such trade union shall or shall not be employed, and it is therefore by virtue of that sub-section excluded from the cognisance of the Court. There then is the issue. Is this, in substance, the object of either action?

A simple mind has some difficulty in comprehending how either of these actions, whatever latitude of interpretation be permitted in expounding the words of the sub-section, can be properly so described. None of the plaintiffs is seeking to enforce either directly or otherwise any agreement concerning the conditions on which he shall be employed. None of these plaintiffs is seeking to be restored to membership in order that he may, either directly or otherwise, enforce any agreement concerning the conditions on which other people shall be employed. His complaint indeed is not that any such agreement has been or is in danger of being broken either by himself or anybody else. His complaint, and his only complaint, is that, although every obligation laid upon him in that or any other respect towards the defendant union and his fellow members has been performed and observed, the defendants nevertheless threaten to expel him from his membership.

It is of course true that, if a restrictive agreement in the terms expressed in Rule 32 or in Rule 31, as the case may be, is to be implied on the part of each plaintiff (and it is a matter of implication, if anything), no such agreement could in any

Court, by reason of the sub-section, be enforced as against him by any fellow-member or the union itself, or by him against any fellow-member. And it is to such a proceeding that the prohibition of this sub-s. 1 of s. 4 is, in my judgment at least, primarily, if not exclusively, directed. If that were not the effect of the sub-section the result, says Sir George Jessel in *Rigby* v. *Connol* (1), " would have been this, that an agreement between a number of workmen once entered into, compelling them to work in a particular manner, or to abstain from working in a particular manner, would have been enforceable according to law, and to a certain extent would have reduced some portion of the workmen to a condition of something like serfdom and slavery. Of course the Legislature, by interfering, had no idea of doing anything of that sort." But it is not suggested that anything of the kind is involved in either of these actions, and I ventured to ask counsel how, that not being suggested, an action at the instance of any of these plaintiffs, as plaintiffs, capable of being brought within the words of the sub-section could be framed. The substance of the matter and not the form, he observed, should be regarded. With that I entirely agree, and an action which, fitting the complaint of the plaintiffs, would, he suggested, in substance, come within the prohibition of the sub-section, would be one in which the plaintiff asked for a declaration that Lever Brothers' co-partnership scheme was not, within the meaning of Rule 32 of the one union, a co-partnership system, or, within the meaning of Rule 31 of the other, a premium bonus system, and for an injunction to restrain the defendant union from expelling him from the union on the footing that it was.

I believe that no form of action nearer to the words of the sub-section and fitting the plaintiffs' grievance in these cases can be suggested, but how such an action would, in substance, be an action directly to enforce an agreement concerning the conditions on which the plaintiffs shall be employed I confess I am still unable to see. The more the situation is analysed the more clear to my mind does it become that the

(1) 14 Ch. D. 482, 490.

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substance and the only substance of each plaintiff's action is to establish his contract and status of membership in his defendant union.

But it is said that this Court is not entitled to say so, having regard to the decisions of the Court of Appeal on this very sub-section in *Chamberlain's Wharf* v. *Smith* (1), and to some observations of Buckley L.J. in the second *Osborne Case*. (2)

With regard to *Chamberlain's Case* (1), I am of opinion that, apart altogether from subsequent observations on that decision, which have displaced the correctness of some of the grounds on which it is rested, the case itself is not one which, on its facts as found, would govern the present.

There the union concerned was a mere association of traders to maintain prices. It provided no benefits for its members and was constituted wholly for protective, and apart from the statute, illegal purposes. The injunction sought by the plaintiffs there to restrain their expulsion from the association, because they had been expelled without being heard, was objected to finally by counsel for the union on the ground that the plaintiffs were really asking the Court to declare them entitled to the benefit of the rules, and to enforce the application of the property of the association in accordance with the rules, and it is, I think, clear that the Master of the Rolls, and possibly also Rigby L.J., refused the injunction on the first ground, and Collins L.J. on the second. "The plaintiffs claim the aid of the Court in order to maintain their position as being entitled to rights in the character of members of the Association," said the Master of the Rolls, that is to say, as I interpret his words, in order that they may maintain and directly enforce the restrictive obligations imposed on their fellow-members, which was the only privilege that membership of that union conferred. With Fletcher Moulton L.J. and Buckley L.J. in *Osborne's Case* (3) in the passage already referred to by the Lord Justice, I find it to be a logical contradiction to say that to put a man in a particular position where he cannot enforce a particular

(1) [1900] 2 Ch. 605, 612. (2) [1911] 1 Ch. 540, 570.
(3) [1911] 1 Ch. 540.

agreement is directly to enforce it. No such purpose, however, can be or is attributed to the plaintiffs in these actions. The position of each of them I may describe in the language of Buckley L.J. in *Osborne's Case* (1): "He was a person who before his expulsion enjoyed certain contractual relations with the other members of the society, which, even if the trade union was illegal at common law were by s. 3 of the Act lawful as matter of contract between him and his co-members. He enjoyed a vote as a member, a right to subscribe to certain funds, a right to benefits from those funds, an interest in common with his fellow-members in the property of the society, a like right in all the advantages of membership, and, in case the society should be dissolved and the common purposes thus come to an end, a right to his distributive share of the assets."

Accordingly, to the present case, and to exclusion from membership of a union like either of the defendant unions here, *Chamberlain's Case* (2), on this view of it, has no application whatever. But all the members of the Court did not base their decision on that view of the case. Collins L.J. based his on the ground that the case was concluded by *Rigby* v. *Connol.* (3) Whether that ground can be justified even in the House of Lords after *Howden's Case* (4) may well be doubted: that it cannot be supported in this Court after *Osborne's Case* (5) was admitted by counsel for the respondents.

The result, therefore, in my judgment, is to rule out *Chamberlain's Case* (2) altogether as an authority relevant for consideration in these appeals.

The observations of Buckley L.J. in *Osborne's Case* (5) must be differently dealt with. They are directly in point. Put shortly, the Lord Justice there, in certain passages in his judgment, intimated his opinion to be that no action can, in any view of s. 4 of the Act, be brought to restrain expulsion from a trade union, where such expulsion is based upon an

(1) [1911] 1 Ch. 567.
(2) [1900] 2 Ch. 605.
(3) 14 Ch. D. 482.
(4) [1905] A. C. 256.
(5) [1911] 1 Ch. 540.

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alleged breach of any rule covered by any of the provisions in s. 4. To adjudicate in such an action, he says (1), "would have involved an investigation whether they" (the plaintiffs) "had broken the rule or not. This the Court could not entertain." The action in *Chamberlain's Case* (2), he says, was "to enforce an agreement falling within s. 4, sub-s. 1, not affirmatively, it is true, by restraining members from breaking it, but negatively, by restraining the society from expelling them for a breach of it, which the society alleged and they denied. Had the breach been established in the action the Court would have been called upon to decide that the expulsion was valid because the members had broken a rule which could be enforced against them. This the Court could not do."

Now these observations were, so far as I can see, in no way necessary to the decision of *Osborne's Case*. (3) I do not find that they are or would have been adopted by the Master of the Rolls or Fletcher Moulton L.J.; and while I make the observation with the utmost diffidence in view of the deep respect I entertain for any opinion of Lord Wrenbury's I cannot myself understand how, by asking the Court to restrain a union from expelling you for the alleged breach of an agreement, which breach you deny, you are negatively or otherwise directly enforcing an agreement concerning the conditions on which you are employed. The truth is, as it strikes me, that in such a case it is the defendant union that puts in issue the agreement and its alleged breach. Neither the one nor the other is any part of the plaintiffs' case. If, on the agreement and its alleged breach being referred to, the agreement is seen to be illegal, that may be fatal to the defence; but it should not affect the plaintiff's right to have his status of membership recognized and his contract of membership enforced, that contract not being one withdrawn from judicial cognisance by the section.

And I myself find a reason different from that of the Lord Justice for Sir George Jessel's omission to decide *Rigby* v. *Connol* (4) on the ground that it was an action by the plaintiff

(1) [1911] 1 Ch. 570.
(2) [1900] 2 Ch. 605.
(3) [1911] 1 Ch. 540.
(4) 14 Ch. D. 482.

directly to enforce his own restrictive agreement as to his conditions of work. It did not, I think, occur to Sir George Jessel that the action could be so described. This is, as it seems to me, shown not only by his statement in the passage I have already cited from his judgment as to the purpose of excluding from the jurisdiction of the Court the enforcement of such agreements as are referred to in sub-s. 1 of s. 4, but by the fact that he found the agreement which the plaintiff, as he thought, was then actively enforcing, by treating as made an amendment in the pleadings sufficient to allege it.

Again *Chamberlain's Wharf* v. *Smith* (1), as I see it, was not decided as it was because the plaintiffs there were treated as enforcing their own respective agreements. It was so decided, as I have endeavoured to show, because they were seeking to be placed in a position to enforce the restrictive agreement of their fellow-members.

I cannot find that, apart from the Lord Justice's judgment, such an action as the present, has in this country been described as he describes it: a similar description subsequently attributed to such an action in Scotland merely, I think, followed the Lord Justice where he had led. For these reasons I do not feel able to accept these observations of Buckley L.J., and they are not, I conceive, binding on us.

It follows that, in my judgment, there is no authority which prevents the Court from entertaining the claims made by the plaintiffs in these actions, and, as I think, the Court is bound to entertain them on the ground which cannot be better expressed than in the words of Cozens-Hardy M.R. in *Osborne's Case* (2): "If a member is threatened with expulsion on grounds not justified by the rules, there is nothing in s. 4 which prevents him from maintaining an action to restrain the contemplated wrong."

In view of the judgments just delivered, I can deal more shortly with these appeals on their merits. The principle to be followed is well settled: "A power to expel will not be implied," said Swinfen Eady L.J. in *Kelly* v. *National Society*

(1) [1900] 2 Ch. 605. (2) [1911] 1 Ch. 554.

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of Operative Printers (1), "it must be found in the rules and in plain and unambiguous language."

In *Ashley* v. *General Union of Operative Carpenters and Joiners*, the second of the two cases before us, the contention that a participant in the Lever Co-partnership scheme was "working on the premium bonus system" was not, in my judgment, made good. No definition of such a system remotely descriptive of that co-partnership scheme was adduced, and the contention that that scheme was within the spirit of the premium bonus system by reason of the undertaking given by each applicant for a partnership certificate not "to waste time, labour, materials or money in the discharge of my duties but loyally and faithfully further the interests of Lever Brothers, Ld., its Associated Companies and my co-partners to the best of my skill and ability," cannot in my judgment be upheld, if at all, until it is made plain by the rules of the union in language not to be misunderstood by any of its members, that a promise of such a character made by a member to his employer is avowed to be a justification for his expulsion from its ranks. It will be time enough to consider the effect of such a rule when it has been made.

Rule 32 of the Amalgamated Society, in my judgment, far more nearly suffices to justify the proposed expulsion of the plaintiffs in the first action, although it also fails, as I think, to reach the degree of directness required by the law for such a purpose.

Speaking for myself and in view of the description given to their own scheme by its authors I would, I think, have been prepared to hold—I speak guardedly, because we did not hear counsel in reply—that a participant in the Lever Co-partnership Scheme was within the meaning of that rule working on a "co-partnership system," if the sense in which these last words are there used had not been made sufficiently plain by the addition of the words which immediately follow "when such system makes provision for the operatives holding only a minority of the shares in the concern."

(1) 31 Times L. R. 632, 633.

These words however, to my mind, clearly enough indicate that a labour co-partnership which is there pointed at is one which, by giving a voice to labour in the conduct of a business while expressly excluding it from the possibility of control, embodied a scheme which the literature of trade unionism shows was widely regarded amongst trade unionists as one for the supersession of trade unionism itself.

In my judgment this so-called Co-partnership Trust cannot be brought within such a category.

First of all, it is not really a trust of Lever Brothers, Ld. It is, in substance and in fact, an arrangement by which the holders of ordinary shares in that company appropriate a prescribed portion of the profits of the company, otherwise divisible amongst them in that character, for the benefit of employees, not of the company only, selected in accordance with the provisions of the trust deed. The scheme in no way affects the proprietary interests of the company or the rights or privileges of any other class of shareholders in it. Reference to it has been introduced into the articles of association merely, as I conceive, to simplify its working so long as consistently with the rule against perpetuities it remains operative. It follows from all this that the idea of control of the company, in any measure at all, is quite foreign to the nature of the scheme. Further it follows, and it has been shown to be the fact, that participation in the scheme does not constitute in any sense a condition of the employment of the participant by the company. No employee of the company is required, nor has he any right, to become a participant in the scheme: the wages or other remuneration payable to an employee participant are in no way reduced or affected by his participation in the scheme. In my judgment the scheme merely provides by the goodwill and at the expense of, in the first instance, Lord Leverhulme, and now of himself and his son, as the ordinary shareholders in the company, a fund out of their dividends for the reward and further encouragement of defined participant employees who are willing to accept and are deemed entitled to receive the benefits of the trust.

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Such a trust is not, I think, within the mischief or terms of Rule 32 at all.

In my judgment, therefore, the plaintiffs in each action are entitled to the injunction which they seek, strictly framed so as to leave the defendant unions free to do anything which legally in altered circumstances may be open to them.

Appeal allowed.

Solicitors: *Pritchard, Englefield & Co., for Simpson, North, Harley & Co., Liverpool; Kinch & Richardson, for Howard, Laycock & Co., Manchester; C. H. Osborn, for T. H. Hinchcliffe, Manchester.*

G. A. S.

C. A. 1921 *June* 17, 20, 21.

SUN PERMANENT BENEFIT BUILDING SOCIETY *v.* WESTERN SUBURBAN AND HARROW ROAD PERMANENT BUILDING SOCIETY.

[1919. S. 1882.]

Vendor and Purchaser—Building Society—Mortgages of Members—Contract to sell Mortgages to another Building Society—Ultra vires—Fines—Specific Performance.

Although a building society may transfer its mortgages either to an individual or to another building society, yet if it agrees to sell those securities to a purchaser and makes no stipulation as to what it is that the purchaser is to take under such agreement for sale, the only conclusion that can be drawn is that it agrees to transfer such benefits as it itself enjoys, and that it cannot do.

The plaintiff society was in liquidation, and in May, 1919, its liquidators entered into a contract with the defendant society for the sale to the defendant society of thirty-seven of the freehold and leasehold mortgages of the plaintiff society for 6400*l.* The defendant society having declined to complete, the plaintiff society issued a writ for specific performance. Subsequently the parties by agreement stated a special case for the opinion of the Court as to (amongst other things) whether the contract was ultra vires the defendant society, because it had not at the date of the contract surplus funds properly available for investment, and whether the plaintiff society could transfer the mortgages without the consent of the mortgagors. Both these points were decided in favour of the plaintiff society: see [1920] 2 Ch. 144.

At the trial P. O. Lawrence J. held that the plaintiff society was entitled to specific performance of the contract. On appeal:—

Held, that although the contract might be intra vires in its inception, notwithstanding that the defendant society had not sufficient surplus funds to carry it out, yet if at the time when an order was made for its specific performance the defendant society had not sufficient surplus funds the effect of the order would be to require the society, which was not an investing society, to invest moneys which were not its surplus funds in a security in which it had no power to invest them.

Held, also, that a further effect of the order, if made, would be to require the defendant society to borrow money to pay for the mortgages; and that as its borrowing powers could not be resorted to except for borrowing for the purposes of the society, and as the purchase of the mortgages was not one of those purposes, the order would be an order requiring the defendant society to do an ultra vires act.

Held, therefore, that no order for specific performance ought in the circumstances to be made.

Held, further, that having regard to the fact that the mortgages in question were building society mortgages, the plaintiff society was not in a position to transfer to the defendant society all the rights and benefits to which under them it was itself entitled, the plaintiff society was not ready and willing to perform its part of the contract and consequently that it could not enforce the contract.

Decision of P. O. Lawrence J. ante, p. 83, reversed.

APPEAL from the decision of P. O. Lawrence J. (1)

The facts are fully stated in the report of the case in the Court below, and, for the purposes of this report, were shortly as follows. The Sun Permanent Building Society (hereinafter called the plaintiff society) was in liquidation, and on May 28, 1919, its liquidators entered into a contract dated May 28, 1919, for the sale to the Western Suburban and Harrow Road Permanent Building Society (hereinafter called the defendant society) of thirty-seven mortgages of the plaintiff society for 6400*l.* 12*s.* 1*d.* in the circumstances detailed in the report below. The defendant society having declined to complete the contract, the plaintiff society issued the writ in this action for specific performance.

After pleadings were delivered the parties by agreement stated a special case for the opinion of the Court on three preliminary points—namely, (1.) whether the contract was ultra vires the defendant society; and, if so, whether it was capable of being enforced by the plaintiffs against the defendant

(1) Ante, p. 83.

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society, (2.) whether the liquidators had power under the provisions of the Building Societies Acts and of the rules of the plaintiff society to sell and transfer the mortgages without obtaining a supervision order under the Companies (Consolidation) Act, 1908, and (3.) whether the plaintiff society could transfer the mortgages without the concurrence of the mortgagors. All three points were decided in favour of the plaintiff society: see *Sun Permanent Building Society* v. *Western Suburban and Harrow Road Building Society*. (1) Subsequently the defendant society delivered an amended defence in which they pleaded (*a*) that both parties entered into the contract under the mistaken belief that the transaction was a transfer of engagements under s. 33 of the Building Societies Act, 1874 (which it was not); alternatively, that the directors of the defendant society entered into the contract in such a mistaken belief as entitled the defendant society to be relieved from the contract, (*b*) that the plaintiff society knew through its agent Frost, who was the auditor of the defendant society, that the defendant society had not surplus funds sufficient for the purchase of the mortgages, and that the directors thereof were not acting under s. 25 of the Building Societies Act, 1874, and the plaintiff society therefore was not entitled to specific performance, (*c*) that the plaintiff society was unable to assign to the defendant society the benefit of the mortgagors' covenants to pay the fines and other payments (other than the principal and interest) secured by the mortgages, (*d*) that the unexhausted borrowing powers of the defendant society were insufficient to carry out the contract, and no order ought to be made which would compel the directors of the defendant society to contravene the Building Societies Acts or to commit a breach of trust, (*e*) that it would be a breach of trust on the part of the directors of the defendant society to invest its surplus funds upon the mortgage securities comprised in the contract.

The action came on for trial on January 17, 18, 21, February 17, 1921. On March 2, 1921, P. O. Lawrence J.

(1) [1920] 2 Ch. 144.

delivered a considered judgment in which he held that all the various points taken by the defendant society failed and that the plaintiff society was entitled to a decree for specific performance of the contract. (1)

From this judgment the defendant society appealed.

On April 25, 1921, the defendant society applied to the Court of Appeal for an extension of time to appeal from the order of P. O. Lawrence J. on the special case. The Court of Appeal being of opinion that they would be in a better position to deal with the matter when they knew more of the case adjourned the hearing of the application and directed that it should come on with the hearing of the appeal.

On June 17 and 20, 1921, the application for leave to appeal from the order on the special case and the appeal from the judgment in the action came on for hearing.

The question as to leave to appeal, which does not call for a report, was first argued.

The Court of Appeal held that the defendant society having deliberately elected to abandon the points relied upon by it on the hearing of the special case and having put in an entirely fresh defence based on the assumption that the order of April, which had long since become unappealable, had, so far as it went, to be accepted as definite between the parties, ought not now to be allowed to revive the points originally raised by it on the hearing of the special case. They accordingly refused the application.

The appeal from the judgment on the trial of the action was then argued.

Tomlin K.C., *Owen Thompson K.C.* and *E. A. Jennings* for the defendant society. The purpose and object of a building society is to make advances to its members. Its borrowing powers are strictly limited. It has no power to borrow money in order to purchase property as an investment. Under s. 25 of the Building Societies Act, 1874, it has power to invest its surplus funds, but not upon such a security as these mortgages. It cannot raise money for speculation by issuing shares

(1) Ante, pp. 83, 90.

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or borrowing in order to purchase property. If it has no funds not immediately required for its purposes it cannot borrow from its bankers in order to effect a purchase of property: *Moye* v. *Sparrow*. (1) How narrow are the powers of such societies is shown by *Small* v. *Smith* (2), where in the case of a Scottish building society governed by the Act of 1874, it was held that a transaction not authorized by the rules, and not incidental to the conduct of the society's business was ultra vires, although it was a case of salvage. It was no part of the duties of the directors of the defendant society to enter into a contract for the purchase of the mortgages of another society: *Grimes* v. *Harrison*. (3) The defendant society had no power except to invest money in hand not immediately required for the purposes of the society. At any rate it had no power to invest in these securities. From a building society point of view it was a preposterous transaction. But assuming that the agreement for purchase of these mortgages was intra vires, when the powers of the defendant society and its financial position are examined, the agreement cannot be specifically performed, except by compelling the society to commit acts which are either ultra vires or breaches of trust. The plaintiff society was never in a position to perform the contract at any time. There was no power in the plaintiff society to transfer the mortgages without the consent of the mortgagors: *In re Rumney and Smith* (4); *Ulster Permanent Building Society* v. *Glenton*. (5) To enforce specific performance of the contract would be to force upon the defendant society a doubtful title which no Court would do.

[YOUNGER L.J. P. O. Lawrence J. has decided the point as to the concurrence of the mortgagors against you (6), and you have not appealed.]

Apart from any question of ultra vires, this investment would be a breach of trust. It was manifestly "attended

(1) (1870) 18 W. R. 400; (1870) W. N. 33.
(2) (1884) 10 App. Cas. 119.
(3) (1859) 26 Beav. 435.
(4) [1897] 2 Ch. 351.
(5) (1888) 21 L. R. Ir. 124.
(6) [1920] 2 Ch. 144.

with hazard" within the words of Lord Watson in *Learoyd* v. *Whiteley*. (1) These mortgages are leasehold securities for terms which in no case exceed forty-three years. They are repayable over a long series of years, and are improper investments for trustees to make. The Court will not enforce a contract which would involve a breach of trust by the directors. The plaintiff society cannot give the defendant society what it has contracted to give. That is a sufficient answer to the claim for specific performance.

There was here a mistake of a unilateral character. The defendant society is in the position of a purchaser at an auction who has made a mistake as to the lot he intended to buy. The Court will not in such a case decree specific performance: Fry on Specific Performance, 4th ed., p. 332. The defendant society cannot perform the contract without doing acts which are ultra vires the society, or breaches of trust. Having in fact no surplus funds, it could never provide the purchase money for these mortgages without acting ultra vires. In such a case the Court will not decree specific performance: *Mortlock* v. *Buller* (2); *Harnett* v. *Yielding* (3); *Sheffield and South Yorkshire Permanent Building Society* v. *Aizlewood*. (4)

Jenkins K.C. and *E. A. Wurtzburg* for the plaintiff society. This is a perfectly valid contract. The plaintiff society in entering into it were entitled to assume that the directors of the defendant society were acting within their powers: *Eastern Counties Ry. Co.* v. *Hawkes*. (5) It was not concerned with the question whether or not the defendant society could borrow the money necessary to carry out the contract. That was a matter of internal management of the affairs of the defendant society with which the plaintiff society had no concern. A building society may be bound by a contract which as between itself and its agents is unauthorized. A contract which is not ultra vires in its inception cannot ex post facto become ultra vires. The present case has nothing to do

(1) (1887) 12 App. Cas. 727, 733.
(2) (1804) 10 Ves. 291, 312.
(3) (1805) 2 Sch. & Lef. 549, 559.
(4) (1889) 44 Ch. D. 412.
(5) (1855) 5 H. L. C. 331, 362.

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with the law relating to trustee and cestui que trust, and therefore *Mortlock* v. *Buller* (1) has no application. When once a binding contract is established the Court will, in the event of its breach, either decree specific performance or give damages. In the present case damages would not afford an adequate remedy, and specific performance should therefore be decreed.

The plaintiff society relies on *Sheffield and South Yorkshire Permanent Building Society* v. *Aizlewood* (2), where Stirling J. held that directors of a building society, having a large discretion vested in them as confidential agents, might properly make advances on a class of securities forbidden to ordinary trustees, and were not precluded from making advances of a speculative nature. That case is an authority for the proposition that so far as the directors are concerned persons dealing with a building society are entitled to deal with them on the same footing as with directors of a company and to rely on their discretion: see also *Marzetti's Case.* (3) The defendant society has power to invest on real and leasehold securities and all the plaintiff society has to show is that the mortgages in question are real or leasehold securities. It is submitted therefore that the defendant society having bound itself by contract the Court has jurisdiction to decree its specific performance.

[YOUNGER L.J. Has the Court power to direct the defendant society to do an ultra vires act?]

Where a contract is established it is permissible to the Court to grant the ordinary relief. If the contract is intra vires in its inception there can be nothing ultra vires in carrying it out. The Court has power to decree its specific performance, and if it does so no question of ultra vires will arise.

It was suggested that there was a unilateral mistake, but that mistake was as to the effect of the contract and ought not to influence the Court to refuse specific performance: *Tamplin* v. *James.* (4)

It was contended that these mortgages were not such real

(1) 10 Ves. 291.
(2) 44 Ch. D. 412, 452.
(3) (1880) 28 W. R. 541, 543.
(4) (1880) 15 Ch. D. 215, 217.

and leasehold investments as the directors of the defendant society ought under the Act to invest in. That however was a matter upon which the directors were entitled to exercise their discretion: *Learoyd* v. *Whiteley*. (1) The Court is not here dealing with the investment of a trust fund as between trustee and cestui que trust. The funds of a building society invested in the names of trustees of a building society under the direction of the board are not trust funds subject to the powers conferred by the Trust Investment Act, 1889: *In re National Permanent Mutual Benefit Building Society*. (2) It is not shown that these securities were not of full value or that there was anything objectionable in them from a financial point of view, or that there was anything in the transaction disadvantageous to the defendant society.

Further, it is submitted that the plaintiff society is in a position to perform its part of the contract. It can put the defendant society in substantially the same position towards the mortgagors as that which it itself occupies. That position is shown by *In re Middlesborough, Redcar and Saltburn, &c., Building Society*. (3) Under no circumstances can a mortgagor to a building society be made liable for anything more than the instalments and fines due under his mortgage. If the plaintiff society has these rights under the mortgages there is no reason why it should not be able to transfer them. The mortgagors would be bound by the transfer.

Tomlin K.C. in reply. The plaintiff society has approached this contract on the assumption that it was intra vires for all purposes, whereas P. O. Lawrence J. has held that it was only intra vires in its inception. There has been no final decision that it is intra vires for all purposes.

Sect. 25 of the Act authorizes building societies to invest their surplus funds (inter alia) in real or leasehold securities. There is no ground for saying that the section authorizes them to invest in securities in which trustees would not be entitled to invest—namely, in mortgages the payment off of which extends over a considerable number of years. If

(1) 12 App. Cas. 727. (2) (1889) 43 Ch. D. 431.
(3) (1889) 58 L. J. (Ch.) 771.

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the transaction in the present case is carried out the defendant society will be locking up its funds in such a way that they cannot be rendered fruitful for the purposes of the society. If specific performance of the contract is decreed the defendant society will be saddled with securities which are unsaleable and its funds will be locked up for a long period.

It is submitted that there is here no enforceable contract on the following grounds: (1.) that the contract is one for the purchase of securities which the defendant society had no power to purchase; (2.) that it is one for the application of its funds in a manner in which it was not authorized to apply them, and (3.) that it is one under which the defendant society does not get what it bargained for.

There is one matter which does not depend on the consent of the mortgagors. In the case of a building society fines are a very serious consideration. How do these fines become payable after a building society has assigned its mortgages? After it has parted with its mortgages the society has no power to fine the mortgagees in respect of their non-payment of their instalments of principal and interest. Neither has the purchaser. That alone is a sufficient ground upon which the Court will refuse to enforce the contract either at law or in equity. It is not merely a ground for refusing specific performance, but disposes of the whole of the plaintiff society's case. The rules of the plaintiff society show that the relationship of the society to its members is so close that the membership relationship cannot be separated from the mortgage relationship. Further the defendant society having insufficient surplus funds available for payment of the purchase price could only complete the contract by borrowing for a purpose which is ultra vires the powers of the directors. This again is a ground why the Court should refuse to decree specific performance. The mistake of the directors of the defendant society in entering into the contract was not a mistake of law but of fact.

LORD STERNDALE M.R. This appeal has taken a very long time to argue, but I hope to be able to compress my judgment

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within a reasonable compass. It arises out of an action by the plaintiff society against the defendant society for specific performance, or in the alternative damages for breach, of a contract by the plaintiff society to sell and the defendant society to purchase and take a transfer of certain mortgages. I need not at the present moment further particularise the nature of the mortgages. They were the ordinary building society mortgages granted to the plaintiff society by its members in the ordinary way. The defendant society entered into the contract under an impression which existed in the mind of its chairman that it was getting, not only a transfer of the mortgages, but also a transfer of the members and the business of the plaintiff society which was in liquidation or dissolution, by a transfer of engagements under s. 33 of the Building Societies Act, 1874, which would amount to dissolution. The business of the plaintiff society was being carried on by the liquidators, who had been its former directors, and therefore no question arises here as to their authority to enter into the contract.

The case comes before us in rather an unsatisfactory manner, because, with a very laudable desire to save time and expense, it was agreed between the parties that certain preliminary questions should be decided, and I think at the time both parties were under the impression that in whichever way those questions were decided, there would probably be no further litigation. Unfortunately, those questions which were decided in favour of the plaintiff society were decided in a way that did not put an end to the litigation or to the dispute between the parties, and the case had to go to trial. The defendant society did not appeal against the decision on those preliminary questions, and one of the matters which we have had to determine was whether the defendant society was entitled to an extension of time in which to appeal against that decision. We have decided that that extension ought not to be granted. Of course, if this case goes further, a higher tribunal will be at liberty to review our decision on that point and to extend the time, in the same manner as it may review any other question that we decide;

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and it may be that they may consider it right that they should review the whole case. We did not think we ought to do so. There is no question that, to a certain extent, the decision of the learned judge upon the preliminary points does hamper the consideration of the points we have now to decide. It does not, in my opinion, hamper it so much as at first it appeared to do, by reason of the very limited scope of that decision, a scope which was purposely limited by the learned judge himself.

Having said that, I proceed to deal with the matters which are now before us. As I have said, the chairman of the defendant society, in agreeing to buy the benefit of these mortgages, was under the impression that he was getting a good deal more than he in fact was getting. He thought he was getting a transfer of the membership of the mortgagors as well as the transfer of their mortgages, and that he was getting, in fact, the benefit of the transfer of the business, speaking generally, of the plaintiff society. But he did not get that under the contract; all that he got was the benefit of the mortgages so far as they were transferred by the contract, and so far as the plaintiff society had the power of carrying out that contract when it was made.

Perhaps I ought to refer shortly to the powers of a building society before I deal further with the facts of this case. Of course under the Building Societies Act, 1874, the powers of a building society are strictly limited. The purpose for which a building society may be established is that defined by s. 13 "of raising by the subscriptions of the members a stock or fund for making advances to members out of the funds of the society upon security of freehold, copyhold, or leasehold estate, by way of mortgage." It has power to borrow under s. 15, but the money so borrowed is "to be applied to the purposes of the society"; and it has no other borrowing power. This power is limited to a certain amount in proportion to the subscriptions and the amount for the time being secured to the society by mortgages from its members. "The total amount so received on deposit or loan and not repaid by the society shall not at any time exceed

two-thirds of the amount for the time being secured to the society by mortgages from its members": s. 15, sub-s. 2. Then under s. 25 it has power to "invest any portion of the funds of the society, not immediately required for its purposes, upon real or leasehold securities, or in the public funds," or in any of the other securities therein specified; and under s. 33 "A society under this Act may transfer its engagements to any other such society, upon such terms as shall be agreed upon by three-fourths of the members."

The first point—and this was one of the preliminary points which was taken on behalf of the defendant society—was this: that this agreement was ultra vires the defendant society altogether, and a special case was stated for the decision of the Court on that and two other questions, one only of which was of real importance; and the only allegation that was made of the circumstances upon which the question of ultra vires arose was that at the date of the making of the contract the defendant society had not surplus funds within the meaning of s. 25 available for the transaction. The first question submitted was "Whether the said agreement is ultra vires the defendant society; and if so, whether it is capable of being enforced by the plaintiffs against the defendant society." "If so" should either be read "if not," or if "intra vires," because of course if it was ultra vires there could be no question of enforcing it. On that point the learned judge gave a strictly limited decision, and I point this out because I think it has a bearing upon one of the very forcible arguments addressed by Mr. Jenkins with regard to the objection made by the defendant society to the decree for specific performance. The learned judge said (1): "The sole point I am now considering is whether the mere fact that at the date of the contract to purchase authorized investments the society had not in hand sufficient surplus funds to pay for the investments in full renders the contract ultra vires and void ab initio." And he also said (2): "I am not now considering the question whether the Court would exercise its extraordinary jurisdiction in granting specific

(1) [1920] 2 Ch. 144, 154. (2) Ibid.

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performance of a contract by a building society to purchase an investment if it were shown at the trial that no surplus funds were available to complete the contract, whether such want of available funds had arisen by reason of there never having been any or by reason of such available funds having been diminished or exhausted after the date of the contract. It may well be that the Court in such circumstances would decline to make a decree for specific performance. Nor am I considering whether the Court would in such circumstances grant anything more than nominal damages for a breach of the agreement." I point out the very limited nature of the decision, because the defence at the trial was that granted that the contract was not ultra vires in its inception for the reason alleged, a decree for specific performance ought not now to be granted, inasmuch as it would involve an order to do what were ultra vires acts; and I mention the limited nature of the decision, because a very powerful argument was addressed to us to this effect: that once it has been decided that the contract is intra vires the society, no act which is necessary to carry out that intra vires contract can be ultra vires. Now if the learned judge had decided, and we were bound by his decision, that the contract was not assailable as being ultra vires on any ground, that argument would have much greater force; and I do not say what might be the result if that were the position. But the learned judge, as I have pointed out, decided nothing of the sort, and for that reason I think it was quite open for the defendant society to raise the defence it did—namely, that an order now upon it to perform this contract would be an order upon it to perform ultra vires acts, in the first place upon the ground suggested by the learned judge, that although the contract might be intra vires, notwithstanding that the defendant society had not at the moment of making it sufficient surplus funds, still if, when it came to be ordered to perform the contract, it had not sufficient surplus funds, it would be ordered to carry out a contract which directed the investment of its moneys which were not surplus funds in a security in which it had no power to invest them, because the defendant society is not an investing society.

It has no power to apply its moneys for ordinary investments except under s. 25, which relates only to its surplus funds not required for purposes for which it is established. And it was said, and to my mind said truly, that although the plaintiff society might be entitled to say that the contract was not absolutely bad and ultra vires ab initio, still the Court, in considering whether it would grant a decree of specific performance, which after all is a matter of discretion, must have regard to the question whether the result of such an order upon the defendant society would be that it would have to invest its funds in paying for these mortgages, a mode of investment which it had no power to adopt. It was said also that such a decree would involve another ultra vires act and for this reason: if the defendant society had no surplus funds, it would in order to pay for these mortgages have to borrow; and that its borrowing powers, whether exhausted or not, could not be used except for borrowing for the purposes of the society, of which the purchase of these mortgages as an investment was not one. In answer to that it was said that was a fallacy, because all that the defendant society would be ordered to do would be to pay a debt incurred under a contract which had been held to be valid, or at least one that was intra vires. I am not satisfied with that answer. But it seems to me there is another difficulty in the way of the plaintiff society on that point. As far as I can see the defendant society has no power to hold such an investment as this. It is not an investment for the purposes of the society, and the order upon the defendant society is not only to pay, it is also to perform the contract and to take over the mortgages; and if those are mortgages that it cannot take over, because it has no power to invest in securities of that description—I am not speaking now of whether they are a safe investment but of the nature of the investment—it has no power to hold investments of that description at all. If the order therefore were that the defendant society should do so, it would be again, in my opinion, an order upon it to do an ultra vires act. That I think is enough to dispose of the question whether there

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ought to be a decree of specific performance. In my opinion there ought not, and I think, having regard to the decision of the learned judge and to its limited nature, it is a fallacy to say that it amounts to a decision that the contract is intra vires, and therefore that every act done to carry it out must be intra vires. As I have already pointed out, the learned judge himself did not consider that his decision amounted to anything of the sort, and I do not think it did; nor do I think that the decision of the House of Lords in *Eastern Counties Ry. Co.* v. *Hawkes* (1), which was very much pressed upon us, decides anything to the contrary. The circumstances there were quite different, and I do not think it in any way decides anything contrary to the opinion which I hold upon this matter.

I think therefore that the defendant society is entitled to say that a decree for specific performance in this case ought not to be granted, because it would involve its doing ultra vires acts, even granting that on the sole ground before the learned judge the contract itself should not be held to be ultra vires in its inception.

There is another matter on which I do not intend to say much, and that is whether the contract was ultra vires or whether it could not be performed, because the plaintiff society has no power to transfer these mortgages without the consent of the mortgagors. The learned judge has decided that point, but he has decided it again in a distinctly limited manner. He has held that that power is given to the plaintiff society by the language of the mortgage securities themselves; and he does not decide the question whether, speaking generally, apart from something specific in the mortgages themselves, there is such a power of transfer without the mortgagors' consent; but he did say this (2): "It is possible that difficulties as to the rights of the parties after the transfer may occur in certain events but none that have been suggested appear to me to be insuperable"; and he also said in his judgment against which this appeal is brought, this, which is to the same effect, and shows the limited nature

(1) 5 H. L. C. 331. (2) [1920] 2 Ch. 144, 158.

of his judgment on that point also (1): "Lastly, it is said that there may be some difficulty in the way of the defendant society obtaining the benefit of the fines imposed upon the mortgagors by the plaintiff society's rules, although they are expressly secured by the terms of the mortgages. The liquidators of the plaintiff society have by their counsel stated that they are willing to do all in their power to give the defendant society the full benefit of the mortgages, including the fines, and I cannot help thinking that the ingenuity of counsel will find some way of enabling the defendant society to obtain this benefit. The transferee of a building society's mortgage is notoriously in a difficult position in a case like the present where the mortgage itself contains no provision regulating the rights of the parties after transfer. I do not however intend on the present occasion to determine what form the documents which may be necessary to give the defendant society the full benefit of the mortgages ought to take; these documents will have to be settled by the Court under the decree I propose to make in the event of any disagreement between the parties as to their contents." The learned judge therefore does not decide the point, and a very important point indeed, which has been argued before us—namely, whether, assuming everything else in favour of the plaintiff society, it is in a position to transfer to the defendant society the whole of the rights which the plaintiff society itself has under the mortgages. Unless it can do that, it seems to me it is not in a position to perform its contract. This is a point which goes much deeper than the former one, because the former one was merely an objection to a decree of specific performance and might have left the defendant society open to a judgment for damages for breach of the contract which it has been held it was intra vires for it to make. This, as I say, goes much deeper than that, because if the plaintiff society is not in a position to give to the defendant society all the benefits which it itself had under the mortgages, it is not ready and willing to perform its contract. It is not enough for a plaintiff to be willing to perform his

(1) Ante, p. 97.

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part of the contract, he must also be ready to do so. Unless he is both ready and willing to perform his part of the contract, he cannot enforce it upon the other party; therefore this point goes to the right to damages as well as to the right to a decree for specific performance. Now it is a matter upon which I confess I have had doubt from time to time in the course of the argument, but upon the whole I have come to the conclusion that the defendant society is right upon this point, and that although it may be intra vires to make a contract, and there may be power to make a contract for the transfer of the mortgages without the mortgagors' consent, a decision that such is the case does not involve a decision that, under the transfer when made, the transferor is in a position to do all that he has to do in order to enforce his contract against the transferee. I do not propose to read the whole of this mortgage; the other members of the Court will probably develop this point more than I think it necessary to do; but there are in these mortgages clauses which contain agreements and covenants that the mortgagors will pay to the plaintiff society—that is, the transferor society—subscriptions, fines, fees, and other payments whatsoever which under the rules and regulations for the time being of the society shall from time to time become payable, and so on: and there is also an agreement that the mortgagors will comply with the rules of the society. When you come to look at the rules, there are certain provisions and remedies given to the plaintiff society in consequence of certain actions on the part of the mortgagors which will become almost, if not quite, impossible to enforce, because the plaintiff society is in course of dissolution. It is quite true that the liquidators of the plaintiff society at the Bar both here and in the Court below have offered to do all they can in order to confer these benefits upon the defendant society; they have offered to undertake that the plaintiff society shall not be dissolved until all these matters have been wound up; and to give a power of attorney to the defendant society to enforce these matters. But that they cannot do. They are not in a position to hand over to the defendant society

the rights which the plaintiff society—a society in course of dissolution—has under its mortgages and rules combined, the latter of which the mortgagors covenant to obey. And if this be so, the plaintiff society cannot enforce the contract at all, because, as I say, it is not ready and willing to perform its part of it, and that goes to the root of the whole action, and it does so, in my opinion, without in any way interfering with the decision of the learned judge on the preliminary point.

For these reasons I think that the appeal should be allowed and that judgment should be entered for the defendant society with costs here and below. Of course any costs that are incurred by reason of the application to extend the time for appeal must be borne by the defendant society; and any costs which it has been ordered to pay, if there are any, upon the decision of the preliminary points, must be borne by it. But I think the defendant society should have the costs of the trial and of this appeal.

WARRINGTON L.J. I am of the same opinion. The action is brought by one building society against another for specific performance of a contract for sale and purchase, or in the alternative for damages for breach of that contract. The contract on the breach of which the action is founded is a contract for the purchase by the defendant society and a sale by the plaintiff society of the mortgages granted to plaintiff society by its members in the course of carrying on its business as a building society. Two main defences have been raised by the defendant society to the action. The first defence is that the plaintiff society, having regard to the fact that the mortgages in question are mortgages by its members to itself, is unable to transfer to the defendant society the full benefit of those mortgages. That defence, if made good, goes, of course, to the root of the whole action, and would entitle the defendant society to judgment in its favour.

The second defence is that, even although the defendant society may be liable to an action for breach of the contract in question, the special equitable relief by way of specific

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performance ought not to be granted, because the effect of ordering the defendant society specifically to perform this contract would, as it contends, be to order it to do that which, having regard to the statutory provisions regulating the society and the conduct of its business, would be outside its statutory powers. Of course that defence, if made good, would merely mean that no decree for specific performance could be made, but that the plaintiff society would be left to its legal remedy, which would be to recover damages for breach.

The contract in question was made in May, 1919, by the directors of the defendant society on behalf of its members on the one side and the liquidators of the plaintiff society on the other, the latter society having passed a resolution, called a resolution for winding up, but really a resolution for dissolution, in accordance with the Building Societies Act, 1874. The chairman of the defendant society undoubtedly thought that in entering into the contract he was not merely purchasing the mortgages and entitling the defendant society to a transfer of them, but that he was arranging for what, in the Building Societies Act, 1874, s. 33, is called a transfer of its engagements—a very different thing, because a transfer of the engagements of the society means that the members of the one society become members of the other society; and the mortgages are not merely transferred as a separate item of property, but as part of the transfer of the entire business; and the difficulties which have been raised in the present case would not have arisen if that had really been the nature of the transaction. Unfortunately the chairman misunderstood the effect of the letters which passed between the two societies, and the contract must now be treated as one merely for a transfer—a purchase and sale—of the mortgages themselves. Regarded in that way, the contract is one which, if justified at all, can only be justified by the defendant society pursuant to the provisions of s. 25 of the Act. A building society is not a financial society: it is not one of its purposes or objects to invest money. The sole purpose for which a building society may be established is that

which is expressed in s. 13 of the Act of 1874—namely, "for the purpose of raising by the subscriptions of the members a stock or fund for making advances to members out of the funds of the society upon security of freehold, copyhold, or leasehold estate, by way of mortgage." Investment, therefore, is not one of its purposes. There is contained in the Act a further material provision with regard to borrowing money (s. 15); that the society has power to receive deposits or loans of money at interest, but when it receives those deposits or loans they are to be applied to the purposes of the society—that is, to those purposes which have been already defined by the Act; and, further than that, the power to obtain loans is limited by the amount for the time being secured to the society by mortgages from its members (s. 15, sub-s. 2). Therefore, the acquisition of these mortgages would not increase the defendant society's power of obtaining loans and would in no way facilitate the carrying out of its objects; and, as I have said, can only be justified if it is an investment such as is contemplated by s. 25. Sect. 25, so far as material, is in these terms: "Any society under this Act may from time to time, as the rules permit, invest any portion of the funds of the society not immediately required for its purposes"—there again is a reference to the purposes of the society which I have already described; the only funds which the society can invest in pursuance of this provision are such funds as are not immediately required for its purposes. And it is authorized to invest them "upon real or leasehold securities," and certain other securities which are mentioned in the section. The power of investment is limited, first as regards the description of the fund to which it applies and secondly as regards the nature of the securities in which that fund may be invested. The list of investments in the Act of 1874 is very considerably enlarged by the Act of 1894, because that Act authorizes investment in what are commonly called trustee securities; but the limit still remains, and the statutory powers of the society in reference to investments are strictly limited, therefore, by the provisions of s. 25.

I think there is nothing more to which it is necessary to

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call attention before proceeding to deal in turn with the two defences to which I have already referred. The first of those defences is that the plaintiff society cannot effectively transfer to the defendant society the full benefit of that which it has agreed to transfer. This matter, as the Master of the Rolls has pointed out, has already been dealt with to some extent by P. O. Lawrence J. in dealing with the preliminary points raised by the special case. I turn first to the formal order which he pronounced on this point: that is, the order of April 19, 1920; and on this point what he declared was this: "that the plaintiffs can sell and transfer the said mortgages pursuant to the said agreement without the concurrence of the mortgagors." Now that was an extremely limited order; and when the reasoned judgment is looked at, the effect of which is intended to be expressed in this order, it will be seen to be more limited even than the words of the formal order would lead one to suppose. What the learned judge really decided, and the only point which was argued before him, was that a transfer of this building society's mortgages could be made without the concurrence of the mortgagors, because the mortgagors were bound to allow such transfers as valid by the terms of the mortgage deeds themselves. He did not decide what would be the nature of the property which such transfers would convey to the purchaser, or whether such transfers as the plaintiff society could make would satisfy the contract into which it had entered. It is, therefore, quite open to this Court to consider and decide whether the plaintiff society can or cannot give to the defendant society the full benefit of that which it has contracted to give. Now the plaintiff society has contracted to sell these mortgages: what does that mean? I think it means clearly that it has contracted to put the defendant society in the same position in reference to these mortgages as regards their enforcement and the benefit to be derived from them as it itself enjoyed. Can it do that? It can of course transfer the mortgage debts. That is not denied. It can also transfer the security for the mortgage debts, that is, freehold or leasehold hereditaments,

as the case may be, which were granted or assigned by them as security. But a mortgage from a member to a building society is a great deal more than merely an obligation to pay the mortgage debt and a conveyance of certain property by way of security. It purports to give to the society, which in that case is the mortgagee, rights and advantages derived from the Act of Parliament and from its own rules and regulations, the nature of the main advantages so given, being the right of the society to enforce, as against the mortgagor, the payment of fines and penalties for non-performance of his obligations, partly under the mortgage itself and partly under the rules and regulations of the society. Those are advantages which, as between an ordinary mortgagor and mortgagee, cannot be claimed, because it is perfectly familiar to those who are acquainted with the mode in which a Court of equity deals with the position of the mortgagor, that no penalty can be enforced upon a mortgagor for non-payment at a particular time of money payable under the mortgage. If, in the interest of the mortgagee, it is required that the payment whether of interest or instalment of principal should be made punctually, the mortgage deed must provide, not for a penalty if the payment is made otherwise than punctually, but for an advantage to be given to the mortgagor on payment being made punctually. Therefore, except for the position which obtains as between mortgagee and mortgagor, in the case of a building society mortgage, these particular advantages under a building society's mortgage could not be enforced. For this purpose, although the transferee in this case is itself a building society, the mortgagors are not its members, and it would be in no better position, for the purpose of enforcing these particular obligations of the mortgagors, than it would be if it were an ordinary individual. When, therefore, the defendant society got a transfer, if it did get one under this contract, it would not get the full advantage of the mortgage security granted by the mortgagor. And there is another reason why it would not get that advantage, if the first is a bad one, and that is that the right of the plaintiff society to enforce these peculiar advantages would be gone.

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The plaintiff society is in the course of winding up for the purpose of dissolution; it is no longer carrying on its business as a building society. If ex hypothesi it makes this transfer, it is doing it for the purpose of realizing its property and putting an end to its business and dividing what remains amongst its members. How, after that, could it enforce any of these fines or penalties against these mortgagors, either for the benefit of the supposed transferee or for its own benefit. It seems to me it would be hopeless.

The conclusion, therefore, on this part of the case, at which I have arrived, is that the defendant society is right in contending that, although a building society may transfer its mortgages either to an individual or to another building society, yet if it agrees to sell those securities to a purchaser and makes no stipulation as to what it is that the purchaser is to take under such agreement for sale, the only conclusion that can be drawn is, that it intends and agrees to transfer such benefit as it itself enjoys; and that it cannot do. This reason, as I have already pointed out, extends to both the claim for specific performance and to the claim for damages; and if, as I think it is, the defence is a good one, the action fails altogether.

But, supposing I am wrong in that view, it then remains necessary to consider the second of the two defences. Now it is a perfectly well-known principle of the exercise by the old Court of Chancery, and now by a Court administering equity, of the special jurisdiction of specific performance, that it was a relief added by the Court of Chancery in certain particular cases to the relief which a person was entitled to recover at law against another who had broken his contract with him. But being a special equitable relief, the Court of Chancery would not always grant it. In particular cases, and in cases where it was not, according to the principles on which the jurisdiction was exercised, right to grant that special relief, the plaintiff, though not deprived of all remedy, would be left to his strict remedy at law. The question therefore is: Is this one of the cases in which it is right to refuse the special equitable relief by way of specific performance?

The position is this: The contract in question is a contract for the investment of the funds of the society. The only funds which the society is capable of investing are those not immediately required for its purposes. In the discussion on the preliminary points before P. O. Lawrence J., to which the Master of the Rolls and I myself have already referred, the question whether or not the contract, in its inception, was ultra vires the society, was determined, and it was determined in favour of the plaintiff society, but on an extremely limited ground, and with an extremely limited scope. The learned judge was careful to confine his decision to the exact point before him, which was whether or not the mere fact that at the date of the contract there were no surplus funds available for making this purchase, rendered the contract ultra vires the defendant society; and that he decided in the negative. And not only did he confine himself to that point, but he expressly reserved the question whether at the trial the plaintiff society would be entitled to insist upon specific performance. What is now said is that the performance of this contract would involve the commission by the defendant society, the purchaser, of acts which would be ultra vires the defendant society; and, that being so, the Court would not make an order which would be either futile, because the defendant society would not, having no legal power to do so, obey it, or which would compel the defendant society, if it did obey it, to do that which the statute did not authorize and therefore impliedly forbade it to do. If that is made out, then in my judgment that is a good ground for refusing this remedy of specific performance and leaving the plaintiff society to its remedy at law. The question again turns upon s. 25, which gives the limited power of investment. As I have already pointed out, that power is limited first as regards funds that can be invested, secondly as to the securities which can be purchased; and I think it is further limited by this: that inasmuch as the purposes of the society are expressly declared in the Act, the investment must be one which is at all events consistent with the due attainment of those purposes.

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Now there are two ways in which, as it seems to me, the performance of this contract would involve the doing of that which would be an ultra vires act. Neither at the date of the contract nor at any material time since has the defendant society had in its hands any funds not immediately required for its purposes. If it were ordered to pay this purchase money it would be compelled to resort to moneys which are required for its purposes, a thing which it is not authorized to do; or it would be necessary for it to create a fund which is not required for its purposes: it could only do that by borrowing, and it is not authorized to borrow for any such purpose as that. It seems to me, therefore, that the defendant society has no funds which it can so invest; there is no prospect of its having such funds, and it can only obtain them by doing an unlawful act.

But then it is said that the contract has been held to be not a void contract, and therefore that the defendant society is under an obligation to perform it; and the obligation is merely to pay money, and to pay money is intra vires. In my judgment it is intra vires. But that is only to look at this transaction in one and not its most important aspect. The answer to it, as it seems to me, is that the order for specific performance, if made, is not merely an order for payment of money, but it is an order for payment of money for the purpose of carrying out a particular transaction, and that transaction is one which is not within the power of the defendant society to carry out. To pay the money without carrying out the transaction would be to pay money for no consideration, and on that ground would be improper. It seems to me, therefore, that that ground, on which it is said the Court ought to refuse specific performance, is sufficient.

But there is a second ground which has been mentioned by the Master of the Rolls and which appears to me a perfectly sufficient ground also. Although these mortgages may be described as real or leasehold securities, it seems to me that the investment of the funds of the defendant society in these particular securities, cannot be said to be an investment which is within or consistent with the due performance of the

purposes of the society. They would be an investment in securities the money secured by which could only, as I understand, be obtained by monthly instalments, and the purposes of the defendant society may require, and do require, the advancement to its members of money in very much larger sums than these monthly instalments would produce. It seems to me, that not only would it not be consistent with the due performance of the purposes of the defendant society, but that it might prevent, or very seriously interfere with, the due performance of those purposes if so large a sum as that which would have to be invested if this contract were carried into effect, were locked up in these particular securities.

For all these reasons, therefore, it seems to me that the action fails, and that the judgment ought to be for the defendant society with costs both here and below, except of course, as the Master of the Rolls has pointed out, that that would not interfere with the order made as to the costs up to and including the costs of the special case.

YOUNGER L.J. This is an action brought by the plaintiff society, which is now in process of liquidation, and its liquidators for the specific performance of an agreement by the defendant society to take for an agreed sum the transfer of outstanding mortgages on real and leasehold properties granted by its advanced members to the plaintiff society. Now there is a concluded agreement between the two societies of a certain kind. There can, however, I think, be no doubt that while that agreement was being negotiated on behalf of the defendant society by its chairman he was looking for something very different from the agreement by which that society is now bound. He supposed himself to be negotiating an agreement under and by virtue of which the mortgages which were to be taken over by his society would in the result, when the whole matter was completed, represent advances made by that society to its own members—the different mortgagors in effect becoming members of the defendant society in place of being, as they were prior to the transfer, members of the plaintiff society. The learned judge

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finds as a fact that that was the basis upon which the chairman of the defendant society conducted the negotiations, the advantages which it seemed to him would accrue to his society by the consequent increase of its membership being the feature of the transaction which in his view made it one that the defendant society might properly entertain. The learned judge has not gone on to find that that impression was the impression also of the chairman's co-directors, but he arrives at the conclusion that it was so, I think, as a matter of inference. From the transaction, as one sees it set forth in the correspondence, I draw the same inference. There was never any variation in the impression, on the part of those representing the defendant society, as to the nature of the transaction with reference to which the negotiations were taking place; and for myself I have no doubt that if those representatives had had any idea that the transaction then in negotiation would bring with it no accession of advanced membership to the defendant society, they would not have thought it was within their competence to entertain it at all.

Now the agreement which was in fact concluded is an agreement which had no such effect. The contract by which the defendant society is bound—and it must be taken to be bound by some contract by reason of the finding of the learned judge on the special case that the contract was not in its inception ultra vires the defendant society—is a contract by which the defendant society is required to take over those securities of the plaintiff society just as they stand between the mortgagors who gave the securities and the plaintiff society who took them; and the effect of the contract is merely this: that under it the defendant society becomes transferee of the securities as they exist in the hands of the plaintiff society immediately prior to the transfer; no further relation between the defendant society and the mortgagors being either stipulated for or contemplated.

I pause, however, at this point to observe that it is, I think, not to be doubted that the defendant society is to obtain under the agreement in respect of these securities at least all the rights and all the advantages as against the mortgagors

which the plaintiff society possesses, and it is an essential part of the transaction, well understood, as it seems to me, by both parties to it, that that shall be its result. I shall consider later whether this result is attained. But even so regarding the contract, it is, I think, very obvious that there are very many objections attending it from a building society point of view; and for my own part I am not surprised, in all the circumstances, that the defendant society should be eager to take any available objection it can to the conclusions of this action.

This transaction must be taken to be, but it is not in the ordinary sense, an investment of the surplus funds or of any funds of the defendant society. It makes all the difference that it was never during its negotiation so regarded. The proceedings of a building society in making advances to its own members on the security of the freehold or leasehold property of those members, are, I am quite satisfied, governed by entirely different considerations—considerations of a much more generous character—than those which are permissible for the same society when carrying out the investment of its surplus funds. It is an object—in fact it is the only object here—of the defendant society to make advances to its members, and in considering the propriety of such advances, and the sufficiency of the security which may be thereby obtained by the society, it is in the language of the headnote in the case of *Sheffield and South Yorkshire Permanent Building Society* v. *Aizlewood* (1) correct to say that: "The directors of a benefit building society, having a large discretion vested in them as confidential agents, may properly make advances on classes of securities forbidden to ordinary trustees, and are not precluded from making advances on securities of a speculative nature." But, as was explained by North J. in the earlier case of *In re National Permanent Mutual Benefit Building Society* (2), it is not an object of a building society to invest its moneys; and accordingly, when the directors or trustees of a building society are engaged in the investment of its surplus funds, their attitude in considering the propriety of

(1) 44 Ch. D. 412. (2) 43 Ch. D. 431.

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such investments is necessarily totally different, and their decision ought to be guided by quite different considerations.

Now in this case the chairman of the defendant society saw and inspected neither the mortgages in question nor the properties on which they were secured. Regarding the transaction as he did from the point of view of a building society making advances to its own members, he was content with what had been done in the way of investigations by the plaintiff society. Nor was this unreasonable in the view he took of the transaction he was negotiating. But when, contrary to his and the directors of the defendant society's original belief, they found themselves bound by contract to take over these mortgages as an investment of the surplus funds of the defendant society the transaction assumed in their eyes a totally different complexion. To justity such an investment much more thorough investigation into the securities than is open to the defendant society under its contract was imperative; and moreover it is not too much to say that, regarding these mortgages as investments of the defendant society's surplus funds, they are characterized by almost every disadvantage that could attend them. They must, for instance, be treated as an investment of moneys not immediately required. But the repayment of these advances is only to be made over a substantial period of time and by small instalments, which cannot be anticipated without the consent of the mortgagors; so that the investment of these moneys not immediately required on a security of this character becomes an investment which has practically to remain outstanding, however necessary it may be for the defendant society to have the money invested available for appropriation in ordinary course towards the proper purposes of the society.

Accordingly I repeat what I said earlier: when I find that the transaction in which the defendant society finds itself involved is a transaction of this description I cannot be surprised that it is desirous of escaping from it if it legitimately can. This is not to justify the Court in being astute to find some means of escape for the defendant society. If it is

bound by the agreement it is bound by it. But it does save the defendant society from the charge of seeking to evade without excuse obligations solemnly and consciously undertaken.

Now if the whole matter were still open to us, there are several grounds on which, as I think, it might be right for this Court to say that this contract was not binding upon the defendant society at all. I do not, however, say this by way of decision, because we are precluded, as we think, by the previous decision of the learned judge on the special case, from going into some of these grounds, and we have not heard Mr. Jenkins fully upon them: therefore I say no more about them. But there remain at least two grounds not affected by that decision upon which, as it appears to me, the case may be dealt with by us; and I propose to rest my judgment upon that which has been just dealt with by the Lord Justice and also by the Master of the Rolls. I do so for two reasons: first of all, because if that ground be well founded, it disposes of the case altogether; and secondly, because I think that it may be made the basis of decision of this Court without trenching in any way at all, in the view of any of the parties to the litigation, on any point decided by the learned judge on the hearing of the special case.

In my judgment then the plaintiff society fails in this litigation altogether, because it is shown that it is not in a position to give to the defendant society that which under its contract it has agreed to transfer; that is, it is not in a position to place the defendant society, as against the mortgagors, in the same position as the plaintiff society itself stands to-day; or as it will stand immediately prior to the transfer of the mortgages. I do not forget that it has been decided by the learned judge that these securities are transferable securities without the consent of the mortgagors, and by that decision we are bound in this litigation; but that does not decide, nor does it appear to me to touch upon, the question whether that which can be or is transferred will give to or confer upon the transferee society the rights which, under its contract with the plaintiff society, it is entitled

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to have. I need not repeat the grounds upon which that opinion rests, because they have been fully stated in language much clearer than I could use by the Lord Justice who has just preceded me. I agree, if I may respectfully say so, with all that he has said upon that subject, particularly with reference to the question of fines. I would only add this further consideration, one that is, as I believe, highly important. As I read the specimen mortgage deed which has been put before us as representing all the securities, the transfer of this security to the defendant society would not enable the transferee to exercise the powers of realization conferred by clause 5 of it; when this is added to the loss of the fines which would be sustained by the transferee after transfer in the manner stated by the Lord Justice, there results a diminution in the value of these securities in the hands of the defendant society sufficient to make them in its hands practically altogether different from those securities in the hands of the plaintiff society, which are the securities to the full benefit of which the defendant society is under its contract entitled.

Accordingly, in my opinion, the plaintiff society is not in a position, without the consent of the mortgagors, or even, as I think, with their consent, to give to the defendant society the rights which, under its contract, that society is entitled to have. Accordingly, in my opinion, the plaintiff society cannot perform its contract, and this appeal ought to be allowed.

Appeal allowed.

Solicitor for defendant society: *Graham Gordon.*
Solicitors for plaintiff society: *Naunton & Son.*

W. I. C.

In re BOSTOCK'S SETTLEMENT.

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[1920. B. 3304.]

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June 6, 7;
July 26.

Settlement—Executed Trusts—Grant of Freeholds subject to Mortgages—Remainder to Children—Absence of Words of Limitation—Life Estates.

By a settlement made upon his second marriage the husband conveyed freeholds (subject to existing mortgages thereon) to trustees in fee simple to the use of the wife and himself for successive life interests and after his decease "in trust for the child or children" of the husband "now born or hereafter to be born who shall attain the age of twenty-one years and if more than one in equal shares as tenants in common and if there shall be no such child then in trust for the right heirs" of the husband. The husband then assigned leaseholds, chattels and a policy of insurance upon similar trusts which so far as the children were concerned were expressed in identical terms. The settlement also contained a provision enabling the trustees to "mortgage or charge the said premises hereinbefore expressed to be hereby conveyed and assigned with any sum or sums not exceeding together one-half of the expectant share of any child" and to "apply the same for his or her benefit or advancement." There was also a hotchpot clause to the effect that no child of his first marriage was "to take any part of the trust premises herein comprised without bringing into hotchpot all sums of money and other benefits which he or she may receive" under an earlier settlement:—

Held, that the limitations in trust having been perfected and declared by the settlor, they must have the same construction as in the case of legal estates executed, and therefore that in the absence of words of limitation the children took life estates only in the freeholds.

Held, also, that, if it had been necessary to decide the point, there were sufficient indications in the settlement of an intention that the children should take absolute interests in the freeholds.

Principle applied by Chitty J. in *In re Whiston's Settlement* [1894] 1 Ch. 661 followed.

In re Tringham's Trusts [1904] 2 Ch. 487 overruled.

Decision of Eve J. [1921] 1 Ch. 432 affirmed, but on different grounds.

APPEAL from a decision of Eve J. (1)

By a settlement made upon William Bostock's second marriage and dated September 13, 1886, it was recited (amongst other things) that the intended husband was seised in fee simple of certain freehold lands subject to mortgages thereon and the husband by clause 1 conveyed the same to

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trustees to hold the same unto the trustees in fee simple to the use of the husband in fee simple until the intended marriage and afterwards to such uses as the husband and his intended wife Ada Lever should jointly appoint by deed and until such appointment and so far as any such appointment should not extend to the use of the wife for life without impeachment of waste and after her decease to the use of the husband for life without impeachment of waste and after his decease "in trust for the child or children of the said William Bostock now born or hereafter to be born who shall attain the age of 21 years and if more than one in equal shares as tenants in common and if there shall be no such child then in trust for the right heirs of the said William Bostock." Clause 2 contained an assignment of leaseholds subject to the mortgages thereon to the trustees upon similar trusts which so far as the children's interests were concerned were expressed in identical terms, except that the ultimate trust in default of children was to the husband's next of kin. Clauses 3 and 4 contained settlements of chattels and a policy of insurance by reference to the trusts of the leaseholds. Clause 5 gave the trustees power with the consent of the husband and wife or the survivor of them and after the death of the survivor at their own discretion to "sell the said lands messuages hereditaments and premises" and to invest the net proceeds as therein authorized and to stand possessed of the net proceeds and the investments thereof upon the same or like trusts and with and subject to the same or like powers and provisions as were thereinbefore declared and contained concerning the premises thereby conveyed and assigned or such of them as should be then subsisting. Clause 7 provided that the wife and husband during their respective lives and the trustees after the death of the survivor might by any deed "mortgage or charge the said premises hereinbefore expressed to be hereby conveyed and assigned with any sum or sums not exceeding together one-half of the expectant share of any child of the said William Bostock and apply the same for his or her benefit or advancement." By clause 13 the provisions made by this settlement and a

previous settlement therein mentioned for the benefit of the children of the husband were not to be cumulative "and no child of his shall take any part of the trust premises herein comprised without bringing into hotchpot all sums of money and other benefits which he or she may receive or be entitled to under or by virtue of such previous settlement."

The husband died on February 20, 1920, leaving nine children by his first and second marriage, all of whom attained the age of twenty-one years and were still living. The defendant Eric Lever Bostock was one of these children. The husband and wife never exercised the joint power of appointment conferred on them over the freehold lands. These freehold lands were sold in 1896 and 1897 by the wife as tenant for life under the Settled Land Acts and the proceeds of sale invested in personalty and other realty.

This summons was taken out by the present trustees of the settlement to have it determined whether the children of the husband who attained the age of twenty-one years became entitled for an estate in fee simple or other absolute interest in equal shares to the freehold lands thereby conveyed or the property representing the same or whether such children became entitled to such property in equal shares only for their respective lives.

Eve J. held that there was no sufficient indication in the settlement of an intention that the children should take absolute interest in the freeholds and accordingly that in the absence of words of limitation they took life interests only.

Eric Lever Bostock appealed. The appeal was heard on Jan. 28, 31, June 6, 7, 1921.

Maugham K.C., *J. E. Harman* and *Mather* for the appellant. There is no indication of an intention on the part of the settlor to deal differently with the personalty and the realty.

On the question of intention there is no doubt that the

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settlor intended to separate the freeholds and to give to his children who attained twenty-one absolute interests in the freeholds. It is a marriage settlement and there was an intention to settle the whole of the property. Eve J. decided, on the authority of certain cases, that there was no sufficient indication of intention to give the children absolute interests in the freeholds. The words "in trust for" may be equivalent to "to the use of."

[WARRINGTON L.J. referred to Lewin on Trusts, 12th ed., p. 5.]

There is no resulting trust or use to the settlor on these words if there be sufficient indication of intention to the contrary: Lewin on Trusts, 12th ed., p. 233.

[WARRINGTON L.J. See note (*c*). A more liberal construction may be given to a will than to a settlement. In a deed the Court is confined to the actual limitations.]

In creating a trust, a person need only make his meaning clear as to the interest he intends to give, without regarding the technical terms of the common law in the limitation of legal estates. An equitable fee may be created without the word "heirs" provided words be used, which, though not technical, are yet popularly equivalent, or the intention otherwise sufficiently appears on the face of the instrument: see Lewin on Trusts, 12th ed., p. 124.

The question whether there is a resulting use to the settlor is one of intention. There is sufficient indication of intention here to confer upon the children absolute interests in the freeholds.

The Court has here to deal with equitable estates. Where the legal estate is outstanding the whole legal interest may pass without words of limitation. It is admitted that the Court gives the same construction to equitable as to legal limitations; but it is submitted that words of limitation are not necessary in the case of equitable estates. Any words will do if the intention is clear: Williams on Real Property, 15th ed., p. 201; 23rd ed., p. 195. An equity of redemption may be transferred in the same manner as any other equitable estate. In the transfer of equitable rights it is the usual practice to adopt the species of conveyance applicable to

an assurance of legal estate; but it is never absolutely necessary: Sanders on Uses and Trusts, 5th ed., vol. i., p. 377; Williams on Real Property, 15th ed., p. 519; 23rd ed., p. 606. In Williams on the Settlement of Real Estates, p. 60, the rule is laid down that "In equity, if the intent is clear, an estate in fee simple will pass without the use of the word 'heirs'; and an equitable estate tail may be created without the use of the words 'heirs of the body' of the grantee." That rule is correct and is unimpaired by authority, and it would be a harmful reaction to require the use of the words "heirs" or "heirs of the body" in the creation of equitable estates. The rule of law requires that there must be words of limitation to pass the fee in land, but that rule does not, it is submitted, apply where the legal estate is outstanding.

The authorities on the subject commence with three cases before Sir John Romilly M.R.: *Holliday* v. *Overton* (1); *Lucas* v. *Brandreth* (2); and *Tatham* v. *Vernon* (3), in which a contrary view was taken to that contended for on behalf of the appellant. *Holliday* v. *Overton* (1) was the case of a settlement of real estate in trust for children without words of limitation, and it was held that that was not sufficient to pass the equitable fee, and that the children took life estates only. *Lucas* v. *Brandreth* (2) and *Tatham* v. *Vernon* (3) were similar cases. They all dealt with settlements which did not follow the usual form. In *Pugh* v. *Drew* (4) where there was a trust of freeholds for A. and B. in equal shares without words of inheritance, James V.-C. held that they took equitable estates in fee simple.

[WARRINGTON L.J. The settlement there was only a declaration of trust.]

In *In re Whiston's Settlement* (5) it was held that an equitable limitation by way of trust executed, now had the same construction as a legal limitation. The decision of Chitty J. in that case must be read as one in which he was not satisfied

(1) (1852) 15 Beav. 480, 484.
(2) (1860) 28 Beav. 274.
(3) (1861) 29 Beav. 604.
(4) (1869) 17 W. R. 988.
(5) [1894] 1 Ch. 661.

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that the intention of the settlor was clear that the whole interest should pass. In *Dearberg* v. *Letchford* (1) it was held that in the absence of proper words of limitation, or of any words of reference which might supply the defect, the assignment in that case failed to pass the fee simple in the realty, whether the estate was legal or equitable. The deed there was treated as equivalent to a purchase deed. In *In re Hudson* (2) it was held that a reference in a settlement to the terms of the gift in a will of the property settled was not sufficient to supply the want of words of limitation in the grant by the settlor to the trustees of that interest, and that the trustees therefore took only life interests.

In re Tringham's Trusts (3) is in the appellant's favour and, it is submitted, governs the present case. In that case Joyce J. held that, there being on the face of the settlement in question sufficient indication of intention on the part of the settlor that the absolute interest should be given, the beneficiaries under the trust, notwithstanding the absence of any limitations to their "heirs," were entitled as tenants in common in equal shares for equitable estates in customary fee simple.

[LORD STERNDALE M.R. I do not think Joyce J. there gave full effect to what was decided by Chitty J. in *In re Whiston's Settlement.* (4)]

In re Irwin (5) is also against the appellant's contention. In that case Buckley J. thought himself bound to follow *In re Whiston's Settlement* (4), but would have decided it the other way if he could.

In re Tringham's Trusts (3) was followed by Farwell J. in *In re Oliver's Settlement* (6), which is of importance from the appellant's point of view, as showing that the opinions of the older text writers such as Cruise, Hayes and others had not been overruled as Chitty J. in *In re Whiston's Settlement* (4) appears to have thought they had been.

(1) (1895) 72 L. T. 489.
(2) (1895) 72 L. T. 892.
(3) [1904] 2 Ch. 487.
(4) [1894] 1 Ch. 661.
(5) [1904] 2 Ch. 752.
(6) [1905] 1 Ch. 191.

In re Thursby's Settlement (1) is referred to in subsequent cases on this subject, but throws no light on the present question.

In *In re Monckton's Settlement* (2) Sargant J. in effect merely followed *In re Irwin.* (3)

In *In re Nutt's Settlement* (4) Neville J. held that though the gift by deed of an equitable estate in land without words of limitation passed only a life estate, the fee might pass if there was to be found in the construction of the deed as a whole an intention that it should pass.

In *In re Gillies' Settlement* (5) Eve J. found that there was sufficient indication of intention that the beneficiaries in that case should take equitable estates in fee simple notwithstanding the absence of express words of limitation.

It is submitted, therefore, that reading the present settlement as a whole it shows an intention on the part of the settlor to dispose of the whole estate and that the children take the whole of the equitable fee simple notwithstanding the absence of the word "heirs."

Tomlin K.C. and *Gamon* for the trustees of the settlor's will. There have never been two different systems of conveyancing, one at law and another in equity. There has been one system only—namely, that at law—and equity has followed that system. It resulted from this that the same rules as to the construction of conveyancing documents were applied in equity as at law. A different rule of construction was applied in the case of documents which were executed from that which was applied in the case of documents which were in their nature executory. Apart from conveyancing documents, equity operating on the conscience treated a person who had purchased and paid for land as the owner of it. That practice really rested on the doctrine of specific performance, and it is with regard to this that the passages cited from the text writers are to be read: Cruise's Dig., 4th ed., vol. i., § 32, p. 343.

(1) [1910] 2 Ch. 181.
(2) [1913] 2 Ch. 636.
(3) [1904] 2 Ch. 752.
(4) [1915] 2 Ch. 431.
(5) [1917] 2 Ch. 205.

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The law as to the construction of words of limitation in the case of executory and executed trusts is correctly stated in Sanders on Uses and Trusts, 5th ed., p. 281, n. 8: "'In limitations of a trust either of real or personal estate, the construction ought to be made according to the construction of the limitations of a legal estate.' Per Lord Hardwicke, in *Garth* v. *Baldwin.* (1) [See also per Lord Keeper Henley, in *Wright* v. *Pearson.* (2) 'But though it is a trust estate, yet in the case of a trust executed there ought to be no difference of construction in a Court of Equity, from what there is in a Court of law upon a legal limitation.' Where, however, trusts are *executory* merely, and the assistance of the trustees, or of a Court of Equity, is necessary to complete a limitation, the trusts will be executed according to the intention of the creator, although the legal construction of the limitation would be different: *Austen* v. *Taylor* (3); *Duke of Bedford* v. *Marquis of Abercorn* (4); *Davies* v. *Davies.* (5) And see post.]"

Until *Pugh* v. *Drew* (6) there is no authority which supports the appellant's contention that in construing the limitations of equitable estate equity does not follow the law. It is laid down in Sanders on Uses and Trusts, 5th ed., p. 280, that "It is a maxim generally received, that in the construction of trusts, the Courts of Equity adopt the rules of law applicable to legal estates." See also Ibid., p. 301, § 4; p. 335, § 5. It is submitted that in some of the more recent authorities the Court has gone wrong and has forgotten this ancient doctrine.

In Fearne on Contingent Remainders, 10th ed., vol. i., p. 145, where the author says "It is to be admitted, that the general rules of property, respecting legal and trust estates, are the same; but the particular modes of construing the limitations of them may vary," he is there distinguishing between executory and executed trusts. See also Watkins

(1) (1755) 2 Ves. Sen. 646, 655.
(2) (1758) 1 Amb. (Blunt's ed.) 358, 362.
(3) (1759) 1 Eden, 361; 1 Amb. (Blunt's ed.) 376.
(4) (1836) 1 My. & Cr. 312.
(5) (1841) 4 Beav. 54.
(6) 17 W. R. 988.

on Conveyancing, 9th ed., p. 143; Co. Litt., 17th ed., 290B, n. xvi.; Hayes' Introduction to Conveyancing, 5th ed., pp. 84, 85; Norton on Deeds, pp. 329, 332; Preston on Conveyancing, vol. ii., p. 64.

If particular words of limitation are required by law no question of intention can arise. Unless it can be shown the case falls within the class of executory trusts the rule of law must prevail.

It is difficult to say that Farwell J. in *In re Oliver's Settlement* (1) did not think that in the case of an executory trust a Court of equity was not entitled to look at the intention of the settlor. And the same must be admitted of Neville J. in *In re Nutt's Settlement.* (2) In *In re Gillies' Settlement* (3) before Eve J. none of the earlier cases except *In re Whiston's Settlement* (4) were cited. The rule for which the respondents contend was clearly recognized in *Meyler* v. *Meyler* (5); *Middleton* v. *Barker* (6); *Marshall* v. *Peascod.* (7)

It is submitted that the decision in *In re Tringham's Trusts* (8) is wrong and ought to be overruled. It is contrary to the law as previously laid down, and the inference there drawn by the learned judge from the text writers is not accurate.

What constitutes an equitable estate is stated in *Brydges* v. *Brydges.* (9)

Assuming, however, that the respondents are wrong on this point, it is submitted that there are no sufficient indications in the settlement of an intention that the children should take more than life estates. The real and personal estates are kept distinct and go in different ways. Prima facie the rule of law must be applied. To prevent its application there must be something in the language of the document which is inconsistent with that application

(1) [1905] 1 Ch. 191.
(2) [1915] 2 Ch. 431.
(3) [1917] 2 Ch. 205.
(4) [1894] 1 Ch. 661.
(5) (1883) 11 L. R. Ir. 522.
(6) (1873) W. N. 231; 29 L. T. 643.
(7) (1861) 2 J. & H. 73.
(8) [1904] 2 Ch. 487.
(9) (1796) 3 Ves. 120, 126.

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which must be cogent and coercive. There is here nothing of the kind.

Ackroyd for the trustees of the settlement.

Maugham K.C. in reply. It is absolutely clear that the intention of the settlor was that the children should take estates in fee simple, otherwise the gift over is ridiculous. His intention was to make a disposition of his entire equitable fee.

It was said that regard could not be had to the intention of the settlor. That, it is submitted, is wrong. The cases relied upon in support of that contention are all cases of wills, and the Court was there dealing with their construction. It is true that prima facie in construing equitable limitations the Court follows the law: *Garth* v. *Baldwin* (1); *Wright* v. *Pearson* (2); and *Austen* v. *Taylor* (3) are illustrations of that doctrine. But it does not follow that equitable estates can only be limited inter vivos by the same words as legal estates inter vivos. It is conceded that in an ordinary case the Court will construe equitable limitations in the same way as legal limitations, but there is no authority that in the case of equitable estates words of limitation are necessary where the intention is clear: Sanders on Uses and Trusts, 5th ed., p. 377. No attempt has been made by the respondents to deal with the passage in Williams on Real Property, 20th ed., p. 181, or with that in Williams on the Settlement of Real Estates, pp. 58–60. In Williams on Vendor and Purchaser, 2nd ed., p. 651, it is said: "It is settled that equity follows the law to this extent, that a grant by deed of an equitable estate in lands to the grantee simply, without any words of limitation *or any other words indicating an intention to pass the fee*, will confer an estate for the grantee's life only. But it is otherwise if the deed show an intention to transfer the grantor's whole equitable interest in the land." The passage already cited from Lewin on Trusts, 12th ed., p. 124, is correct and has never been doubted. The view for which the appellant contends is also supported by the statement

(1) 2 Ves. Sen. 646. (2) 1 Amb. (Blunt's ed.) 362.
(3) 1 Eden, 361.

in Bythewood and Jarman's Conveyancing, 4th ed., vol. v., p. 459. In *Pugh* v. *Drew* (1), which is in the appellant's favour, it was suggested that the document in question was executory.

[He also referred to *Van Grutten* v. *Foxwell* (2) and Norton on Deeds, p. 609.]

Cur. adv. vult.

July 26. The following judgments were read:—

LORD STERNDALE M.R. The question in this case arises on the construction of a settlement made on the marriage of William Bostock and Ada Lever. [His Lordship read the limitations of the settlement and continued:] No question arises as to the leaseholds and chattels, but in the case of the freeholds the question has arisen whether in the absence of the word "heirs" the children take more than life estates. If the legal estate had been conveyed no question could have arisen; it would have been quite clear that estates for life only were granted to the children. The legal estate was, however, outstanding in mortgagees and therefore William Bostock only conveyed his equity of redemption. In these circumstances it was argued that the settlement only created a trust of equitable estates and in that case the Court was not bound by the construction of the words as applied to legal estates, and if the intention of the settlor to grant absolute interests and not estates for life only appeared sufficiently from the instrument could disregard the omission of the word "heirs" and construe the settlement as granting to the children absolute interests. In dealing with this argument it must be remembered that there is no doubt that the trust in this case is executed and not executory, and therefore the Court has not the power which it would have in the case of an executory trust of moulding the conveyance so as to carry out the settlor's intention.

It was also argued that the power of the Court to disregard the strict conveyancing words and interpret the deed according to the intention appearing in it, though contrary

(1) 17 W. R. 988. (2) [1897] A. C. 658.

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to the strict legal meaning of the language employed, was confined to a case where the equitable estate was created by the deed itself and did not exist in a case like this of the conveyance of an equity of redemption. I do not think it necessary to decide this point and shall treat the case on the footing that the power of the Court is the same in the two cases.

The question is whether if strict conveyancing language with a definite legal meaning is used in the creation of a trust of an equitable estate, it is competent for a Court of equity to disregard that legal meaning where a contrary intention appears from the rest of the deed and construe the deed according to that intention? The point has been discussed in several cases to which I do not think it necessary to refer in detail, and some of them I think are not reconcilable with others. Reliance was also placed by the appellant upon statements in old books of authority on conveyancing which it was argued supported the proposition that if the intention were clear no particular words are necessary to create a trust of equitable estates such as are necessary in the case of legal estates, and therefore that whatever words were used the Court could and would inquire into the intention and construe the deed accordingly. I have looked at these passages carefully, and in my opinion they do establish the first half of the contention, but they do not establish the second, although one passage in Hayes on Conveyancing, 5th ed., p. 91, is in favour of it. There may be other passages pointing in the same direction, but after examining the passages in the text books, and also the numerous authorities to which we were referred, I think the true result is that stated in Lewin on Trusts, 12th ed., p. 125: "But though technical terms be not absolutely necessary, yet where technical terms are employed they shall be taken in their legal and technical sense. Lord Hardwicke indeed once added the qualification, 'unless the intention of the testator or author of the trust plainly appeared to the contrary.' But this position has since been repeatedly and expressly overruled, and at the present day it must be

considered a clear and settled canon that a limitation in a trust, perfected and declared by the settlor, must have the same construction as in the case of a legal estate executed." Applying that result to this case, I think here strict legal conveyancing language has been used, and it must receive its legal meaning. The result is that, in my opinion, in the absence of the word "heirs," the children take life estates only. I am aware that in coming to this conclusion I am differing from the decision of Joyce J. in *In re Tringham's Trusts* (1), and I need hardly say I do so with diffidence. I think also I am taking another view of the effect of the statements in the old conveyancing writers than was taken by that learned judge, and also, I think, by Chitty J. in *In re Whiston's Settlement* (2), but I think there was not before either of those learned judges so full a discussion and examination of those writers as before us.

It was said that to arrive at this conclusion we must also differ from *Pugh* v. *Drew* (3) before James V.-C., but I am not satisfied that this is so, considering the unsatisfactory nature of the report, the brevity of the judgment, and the general terms in which it is expressed.

I therefore arrive at the same conclusion as Eve J., but on different grounds. The learned judge did not decide this point, but gave judgment for the respondents on the ground that no sufficient expression of intention to give the children more than a life estate could be found in the settlement. If it were necessary to decide this point, I should not agree with the learned judge, and I should think there was such a sufficient expression of intention. I think this difference of opinion, and that to be found in some of the cases cited to us, show the advantage of adhering to the recognized meaning of words of conveyancing if the settlor choose to use them, for if once that be put aside the matter is one upon which most varying views as to what was the settlor's meaning may be held, and safety only lies in saying that the settlor or his draftsman has used words with a recognized conveyancing

(1) [1904] 2 Ch. 487. (2) [1894] 1 Ch. 661.
(3) 17 W. R. 988.

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meaning and must be taken to have used them with that meaning.

The appeal fails and must be dismissed.

WARRINGTON L.J. The question in this case is whether the interest in certain freehold hereditaments conferred by a marriage settlement upon the children of the settlor is an estate in fee simple or owing to the absence of words of limitation an estate for life only. Eve J. has decided that the interest is an estate for life. [His Lordship read the limitations in the settlement and continued:] If William Bostock had been seised of the lands for a legal estate in fee simple there could have been no question as to the effect of these limitations. The grantees would be mere grantees to uses which by virtue of the statute would be executed in the beneficiaries, so that they would all take legal estates—Ada Lever for her life, with remainder to William Bostock for his life, with remainder to the children attaining twenty-one for their respective lives equally as tenants in common, and in default of such children, to William Bostock in fee simple. The reversion in fee also remained vested in William Bostock and would take effect on the deaths of such children as might become entitled under the limitation in their favour.

But the fact is the settlor was not so seised of the land. It appears on the face of the settlement that the land was subject to mortgages and was so conveyed. The estate dealt with was an equity of redemption, and all the limitations were therefore equitable. The real question is whether in such a case as the present a Court of equity would follow the law and give to the limitations the same effect as they would have, had the legal estate been dealt with, or would look to the general intention of the settlor expressed in the deed, and, if satisfied that an intention to confer absolute interests on the children is sufficiently expressed, would give effect thereto notwithstanding the absence of the necessary technical words. Eve J. has assumed that he was at liberty to look to the settlor's intention, but has found that the necessary

intention was not sufficiently expressed and has on that ground held that the children take life estates only.

Before us his right to make the assumption was vigorously disputed. If he was wrong in this his judgment would be affirmed, but on different grounds. This question is one of general importance. The point on which the learned judge proceeded depends on the construction of the particular instrument, and I am bound to say that if I felt myself at liberty to act on my view of the construction of the deed without reference to the technical rules governing its effect, I should come to the opposite conclusion to that of the learned judge, but for reasons which I will proceed to give I do not think myself so at liberty, and I therefore refrain from stating in detail the grounds on which my conclusion on this point is founded.

The real question therefore is, in such a case as this, would equity follow the law and give the same effect to the equitable limitations as they would have at law or would it mould them according to the intention ?

The learned judge has based the assumption to which I have referred on the following statement in Lewin on Trusts, 12th ed., p. 124: "In creating a trust, a person need only make his meaning clear as to the interest he intends to give, without regarding the technical terms of the common law in the limitation of legal estates. An equitable fee may be created without the word 'heirs,' and an equitable entail without the words 'heirs of the body,' provided words be used which, though not technical, are yet popularly equivalent, or the intention otherwise sufficiently appears upon the face of the instrument." It is not disputed that this passage expresses a correct view of the law, but it is said, and I think with truth, that it does not apply to the present case. The principle which does apply is that stated on p. 125 of the same book: "But though technical terms be not absolutely necessary, yet where technical terms are employed they shall be taken in their legal and technical sense. Lord Hardwicke indeed once added the qualification, 'unless the intention of the testator or author of the trust plainly appeared to the

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contrary.' But this position has since been repeatedly and expressly overruled, and at the present day it must be considered a clear and settled canon that a limitation in a trust, perfected and declared by the settlor, must have the same construction as in the case of a legal estate executed." I am satisfied that this passage is a correct statement of the law as regards the interpretation and effect of deeds. How far, if at all, it requires modification as applied to wills I need not discuss. The matter has been elaborately discussed in Fearne on Contingent Remainders, 10th ed., vol. i., p. 126, and following pages in reference to the distinction between executed and executory trusts. In the case of the former he says (p. 142) "the Court has no authority to make them different from what they would be at law."

Strictly speaking the present case is not one of trust at all; the estates limited are equitable merely because the legal estate is outstanding, but the limitations are complete and perfect; technical terms and forms of conveyancing are used and the principles applicable to executed trusts are those which must be applied. According to technical rules a limitation to A. and his heirs to the use of or in trust for B. confers on B. a legal estate for life only. Where as here an equitable estate is dealt with it must, in my opinion, confer on B. an equitable estate for life only, and the Court is not, in my opinion, entitled to regard an intention gathered from the terms of other parts of the instrument.

I now turn to the more modern authorities in the form of judicial decisions. Three cases before Sir John Romilly M.R. were cited as supporting the view I have just expressed. Two of them, *Holliday* v. *Overton* (1) and *Tatham* v. *Vernon* (2), were cases of legal limitations, and are therefore not directly applicable. In *Lucas* v. *Brandreth* (3) the limitation in question in trust for the next of kin of the settlor was equitable, the hereditaments being conveyed unto and to the use of the trustees and their heirs. Much stress was laid on evidence of intention to give the next of kin an

(1) 15 Beav. 480. (2) 29 Beav. 604.
(3) 28 Beav. 274.

absolute interest, and there was strong ground for holding that such intention was expressed, but nevertheless the Master of the Rolls considered himself bound to hold that the next of kin took for life only, saying that he thought the case was governed by *Holliday* v. *Overton* (1), in which, as I have already stated, the limitations were legal.

The next case is *Pugh* v. *Drew* (2), a decision of James V.-C. In that case freeholds were conveyed unto and to the use of trustees and their heirs upon the same trusts and so forth as were declared of certain leaseholds by a previous deed or as near thereto as the difference of the estates of the trustees would admit. Amongst the trusts of the leaseholds were trusts for certain persons absolutely. The Vice-Chancellor held that the freeholds also were to be in trust for them absolutely and not for life. In my opinion this decision can be supported on the ground that the trust was executory. The trust was not completely declared by the instrument itself, but by reference to another by which absolute interests were conferred, and, as an estate in fee simple in freeholds corresponds to an absolute interest in leaseholds, the trustees would properly execute their trust by holding the lands in trust for the beneficiaries in fee simple. In other words, in giving effect to the referential trusts the Court would not merely read in the words of the model but would so frame them as to effectuate the obvious intention.

Another case in which effect was given to the intention gathered from the instrument as a whole is *In re Tringham's Trusts.* (3) In that case there was an executed trust of copyholds, the legal estate in which was vested in trustees, for a class of children without words of limitation. Joyce J. finding an intention sufficiently expressed on the face of the instrument held that the children took in fee simple and not for life only. The learned judge took no account of the distinction between trusts executed and trusts executory. In the passage cited by him from Preston (4) the learned

(1) 15 Beav. 480.
(2) 17 W. R. 988.
(3) [1904] 2 Ch. 487.
(4) Elementary Treatise on Estates, vol. ii., p. 64.

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author clearly makes the distinction, the instances given of an estate in fee simple in equity being created without words of limitation being all cases of executory trusts, but yet the learned judge relies on that author's statement in forming his opinion, and moreover in dealing with *Lucas* v. *Brandreth* (1) he says there was nothing to show the intention beyond the simple words of the limitation itself; there was in fact an elaborate argument on the part of Mr. Selwyn and Mr. Jessel founded on expressions of intention, and I gather from the judgment of the Master of the Rolls that he was much impressed thereby. With the greatest respect to the learned judge I think he has applied to an executed trust doctrines applicable only to an executory one, and that his decision cannot stand and ought to be overruled.

In *In re Oliver's Settlement* (2) the trust was "to convey" the estate and therefore executory and the decision may be supported on that ground: see the passage in the judgment of Farwell J. at p. 195.

In *In re Whiston's Settlement* (3) Chitty J. held distinctly that an equitable limitation by way of trust executed has the same construction as a legal limitation. In that case the limitation in question was equitable only by reason that the legal estate was outstanding in a mortgagee, the so-called trustees being merely grantees to uses. The case is therefore precisely in point. The learned judge seems to have thought that there had been a change in the views of text writers on the subject, but I think the statements of the earlier text writers to which the learned judge refers as expressing the view that considerable latitude is permissible in construing equitable limitations are really dealing with either executory trusts or dispositions of equitable interests in an informal manner, in both of which cases effect was given to sufficient expressions of intention. In my opinion the learned judge intended to decide and did decide that in the case of a formal limitation of an equitable estate executed and perfect in itself the Court must give the same effect to it as to a legal

(1) 28 Beav. 274. (2) [1905] 1 Ch. 191.
(3) [1894] 1 Ch. 661.

limitation. It is true that he referred in his judgment to indications of intention which he said were not sufficient, but I am satisfied that in so doing he did not do more than say in effect: "If I am wrong in the principle to be applied the result would be the same."

In my opinion the principle applied by Chitty J. in *In re Whiston's Settlement* (1) is correct, is applicable to the present case, and ought to be applied.

It is unnecessary to refer to the other cases cited, except to mention that in *In re Irwin* (2) Buckley J. expressed and acted on the same view of the law as that adopted by Chitty J.

On the whole I come to the same conclusion, but for different reasons, that the judgment of Eve J. was correct and that this appeal must be dismissed.

YOUNGER L.J. The learned judge in this case decided as he did because he was unable to find in the settlement in question any intention sufficiently manifested to confer upon the children of the settlor any estate in the settled freeholds greater than the life estate which is alone imported by the language employed to define their interest.

As I read his judgment he reached that conclusion with reluctance. I have reached the same conclusion with even greater reluctance, because I cannot take the view of the settlement adopted by the learned judge, and my conclusion is based not on any presumed intent of the settlement but in spite of and contrary to what I believe to be its real purpose.

A close study of the deed satisfies me that it embodies from first to last no other intention than that the children of the settlor on attaining twenty-one are to take an absolute interest no less in the freeholds than in the other property settled, and I cannot bring myself to doubt that the omission from the limitation of the freeholds to the children of the words adapted indubitably to produce that result is an omission of the draftsman attributable either to accident or to ignorance. I desire to state this conclusion in terms

(1) [1894] 1 Ch. 661. (2) [1904] 2 Ch. 752.

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unqualified, because the whole ground of my judgment is that notwithstanding it the Court has no option but to declare, however reluctantly, that these children take in the settled freeholds life interests only.

I doubt whether such difficulty as that with which on some of the authorities we are here confronted would have arisen had the Court always in some recent decisions been vigilant to distinguish between those cases where the question is one of intention and those in which it is not one of intention at all, but is one the solution of which is governed by settled principles of construction operative in equity no less than at law—principles from which no judicial escape is possible. It is because I bow to these principles which, in my judgment, are applicable here, that I feel constrained with the same reluctance as North J. expressed in *In re Hudson* (1) and Buckley J. shared in *In re Irwin* (2)—to join the learned judge in declaring that these children of the settlor, notwithstanding the manifest intent to the contrary, take in the settled freeholds life estates only. And if the question at issue, as I think, is not one of intention I need not detail at length—perhaps I need not even refer to—the reasons which have led me to the conclusion that by this settlement the children in question are intended to take absolute interests in the freeholds. I will permit myself only to say that I find it manifested in the implication throughout the settlement that the proceeds of sale and investment, whether proceeding from the real or personal settled property—shall all be held upon the same trusts—(and the interests of the children in the personal property are admittedly absolute). I find it apparent in the provisions as to hotchpot, and, like Farwell J. in *In re Oliver's Settlement* (3), I find the provision as to advancement almost conclusive and the gift over absolutely conclusive on the subject.

But there is one thing I do not find in the settlement. I find no recital which would justify the Court in saying that its operative provisions are incomplete or imperfect. I find no

(1) 72 L. T. 892. (2) [1904] 2 Ch. 752.
(3) [1905] 1 Ch. 191.

basis for reforming or rectifying it. Nor is there anything executory in the frame of the document. No further or additional instrument is required to give it complete effect. In these circumstances all that the Court can do is to construe it according to the import of the words used.

And in doing so the only difficulty presented is occasioned by the fact that the settled freeholds were at the date of the settlement subject to mortgages so that the conveyance of these was a conveyance of equities of redemption only. The legal estate in every case remained outstanding. We are therefore concerned with equitable estates—such in fact as were in question in *In re Whiston's Settlement* (1)—and I pause here to observe that the distinction suggested by Joyce J. in *In re Tringham's Trusts* (2) between estates which are equitable merely by reason of the legal estate being outstanding in a mortgagee or otherwise and an express trust estate where the legal fee simple is in trustees was not supported in argument and cannot, I think, be maintained. We are dealing here therefore with equitable estates in the relevant sense of these words none the less because we are dealing with uses of equities of redemption executed by the statute.

Now it is not disputed by Mr. Maugham that if these freeholds had not been subject to mortgages, and if by identical words the legal estate in them had been the subject of conveyance, the interests taken by the children would have been life estates only, notwithstanding any intention manifested in the settlement to the contrary. The only question, therefore, is whether, because the interests are equitable, the rule of construction as to legal interests ceases to apply—whether in equity the fee simple passes to the children because the intent is clear.

Now there can be no doubt that in some cases it would so pass. It might do so if the words of conveyance were referential, and the interest conferred by the instrument to which reference was made was an absolute interest: see *Pugh* v. *Drew* (3): it would do so if it were clear on the deed that

(1) [1894] 1 Ch. 661. (2) [1904] 2 Ch. 487.
(3) 17 W. R. 988.

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there was intended to pass thereby all interest that the grantor—owner in fee simple—had in the freeholds conveyed: see *In re Hudson* (1): it would pass if the grantee could establish the right to the grantor's entire interest independently of the deed—e.g., a purchaser who had paid the price for the property. But these children do not stand in that position: see *Holliday* v. *Overton.* (2) And the present is not one of the other cases. Here we have an executed document complete in its terms, expressed in the language of legal limitations, and the result in such a case is thus put by Sargant J. in *In re Monckton's Settlement* (3): "The rule is fairly well settled that in the case of an executed document as distinguished from an executory document the same words of limitation are necessary to convey an equitable estate in fee simple as would have been necessary if the conveyance had been one of a legal estate in fee simple. Equity follows the law in that respect."

The examination of the opinions of the text writers ancient and modern made by counsel before us has satisfied me that the rule referred to by Sargant J. is, and always has been, thoroughly well settled, and I cannot myself doubt that the questions suggested by some of the cases following *In re Whiston's Settlement* (4) would not have arisen if Chitty J. had not in that case too readily accepted the statement of counsel, not as I think on examination justified, that there was on this subject any real divergence of view between the more modern and the older text writers. With slight exceptions, not I think difficult to explain, the true view of all the text writers is that an equitable limitation by way of trust executed has the same construction as a legal limitation. In other words an absolute estate therein can only be conferred by the use of the word "heirs," or since the Conveyancing Act, 1881—but not before—by the addition of the words "in fee simple."

In view of the examination of the authorities just made by the Lord Justice I refrain from saying more. I entirely

(1) 72 L. T. 892, 894.
(2) 15 Beav. 480.
(3) [1913] 2 Ch. 636, 642.
(4) [1894] 1 Ch. 661.

concur in the conclusions drawn by the Lord Justice from that examination, if I may be permitted to say so.

In my judgment the principle contended for by the respondents must be established. We are recognizing here a binding rule of construction. We are disregarding intention altogether, as in duty bound. It is unnecessary to say how reluctant any Court is to take that course. But as Mr. Tomlin says, the rule for which he contends is of such long standing that it deserves for its interment a legislative funeral. I am not certain that it has any deserts, but I am satisfied that whether it has or not it is now beyond the competence of any Court to put an end to its continued operation in cases where it is applicable.

In my opinion this appeal must be dismissed.

Appeal dismissed.

Solicitors for all parties: *Sharpe, Pritchard & Co., for North, Kirk & Co., Liverpool.*

W. I. C.

In re HARCOURT.

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[1920. H. 1325.]

Will—Gift of Heirlooms—To go and be held with Mansion House—"So far as the rules of law and equity will permit"—"To be held and enjoyed accordingly"—Shifting Clause in Settlement of Mansion House—Tenant in Tail—Vesting at Birth—Rule against Perpetuities—Destination of Heirlooms.

By her will, dated in 1872, a testatrix devised an estate and mansion house to trustees upon trust for her niece for life, with remainder to the first son of her niece born in the testatrix's lifetime, who should not be entitled to a certain Barony, for life with remainder to his sons and in default of sons his daughters severally and successively according to seniority in tail, with remainder in tail for every other son of the niece born in the testatrix's lifetime so that every such son should take an estate for life with remainder to his sons and in default of sons his daughters severally and successively according to seniority in tail with

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remainder to every son of her niece born after the death of the testatrix severally and successively according to seniority in tail with remainder over. The will also contained a shifting clause providing that if any son or remoter issue of the niece should succeed to the Barony after becoming entitled in possession to the estate, then the trust declared for the benefit of the son or remoter issue so becoming entitled and of his issue male and female should cease and determine and the estate go over as if he were dead without issue of his body.

By his will, dated in 1874, the testatrix's husband settled chattels "to go and be held so far as the rules of law and equity will permit with the mansion house . . . . as heirlooms, and to be held and enjoyed accordingly in succession by the several persons who shall be respectively entitled for the time being to hold and enjoy the said mansion house"; and other chattels "to go as heirlooms so far as the rules of law and equity will permit" with the estate.

On the death of the testatrix's niece in 1899 her second son succeeded to the estate and mansion house as tenant for life, and he had a daughter born in 1903 who thereupon became tenant in tail in remainder. In 1919 he succeeded to the Barony and the estate and mansion house then passed by virtue of the shifting clause to the third son for life with remainder to his eldest son in tail:—

Held, that the shifting clause was void as regards the chattels by reason of its transgressing the rule against perpetuities, and that the use, in the settlement of the chattels, of the words "so far as the rules of law and equity will permit" did not avail to prevent this.

Christie v. *Gosling* (1866) L. R. 1 H. L. 279 applied.

Harrington v. *Harrington* (1871) L. R. 5 H. L. 87 explained.

Held, therefore, by Lord Sterndale M.R. and Warrington L.J., Younger L.J. dissenting, that the chattels had vested absolutely in the daughter as tenant in tail in remainder at birth, subject to being divested by the birth of a brother, there being nothing in the settlement of the chattels to postpone vesting until actual possession of the estate and mansion house.

In re Lord Chesham's Settlement [1909] 2 Ch. 329 distinguished.

Foley v. *Burnell* (1783) 1 Bro. C. C. 274; (1785) 4 Bro. P. C. 319 applied.

Decision of Eve J. [1921] 1 Ch. 187 affirmed.

APPEAL from the decision of Eve J. (1)

By her will dated May 23, 1872, Lady Catherine Julia Harcourt appointed devised and bequeathed the Buxted Park Estate (subject to the life interest therein of her husband Colonel Francis Vernon Harcourt) to trustees upon trust to pay the rents and annual proceeds thereof to her niece Mary Selina Charlotte, the wife of the Honourable William Henry Berkeley Portman, who was the eldest son of the first Baron Portman, for life for her separate use

(1) [1921] 1 Ch. 187.

without impeachment of waste, and from and after her decease "in trust for the first or only son of my said niece born in my lifetime who shall not, at the decease of my said niece, be entitled in possession or in remainder immediately expectant on the decease of the survivor of the said Lord Portman and William Henry Berkeley Portman to their family Barony of Portman, and from and after his decease in trust for his first and every other son severally and successively according to seniority in tail with remainder in trust for every other son of my said niece born in my lifetime, other than a son for the time being entitled in possession or in remainder immediately expectant on the decease of the survivor of the said Lord Portman and William Henry Berkeley Portman to the said Barony, and the issue of every such son so that every such son may take an estate for his life without impeachment of waste with remainder to his first and every other son severally and successively according to seniority in tail, with remainder to every son of my said niece born after my decease other than a son for the time being entitled in possession or in remainder as aforesaid to the said Barony severally and successively according to seniority in tail" with divers remainders over. The will also contained the following shifting clause: "Provided always and I declare that if any son or remoter male issue of my said niece who by virtue of the limitations herein contained shall be or become entitled in possession to the said estate and hereditaments, shall become entitled in possession to the said Barony, then the trust hereby declared for the benefit of the son or remoter issue becoming entitled in possession to the said Barony and of his issue male and female shall cease and determine as if he were dead without issue of his body, and then and thenceforth the said hereditaments shall go and be in trust for such person or persons as by virtue of the limitations herein contained would then be entitled as the person or persons next in remainder to the same hereditaments, in case such son or remoter issue so becoming entitled to the said Barony were then dead without issue of his body."

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By his will, dated January 3, 1874, the testatrix's husband Colonel Harcourt (in the event which happened of his surviving his wife) gave and bequeathed the Sèvres china flower-stand given to the Earl of Liverpool by Napoleon and certain water-colour drawings "to go and be held so far as the rules of law and equity will permit with the mansion house called Buxted Park as heirlooms and to be held and enjoyed accordingly in succession by the several persons who shall be respectively entitled for the time being to hold and enjoy the said mansion house." He also gave and bequeathed his plate and plated articles and linen to trustees upon trust (after the death of his wife) "to permit all such plate and plated articles as are marked with an Earl's Coronet or with the arms or crest of the Jenkinson or Medley families and also all linen belonging to my said mansion house at Buxted to go as heirlooms so far as the rules of law and equity will permit with the Buxted Park Estate." And he further gave and bequeathed "all the household goods furniture books pictures and china which shall be . . . . in or about my said mansion house called Buxted Park . . . . at the time of my decease" to his trustees "in trust to permit the said household goods furniture books pictures and china . . . . to go and be held so far as the rules of law and equity will permit" with the mansion house "as heirlooms according to the limitations thereof . . . . which shall be . . . . subsisting under this my will or otherwise howsoever at the time of my decease and to be held and enjoyed accordingly in succession by the several . . . . persons who shall be respectively entitled for the time being to hold and enjoy the said" mansion house.

The testatrix died on December 5, 1877, and her husband died on April 23, 1880. The Buxted Park Estate then passed for her life to the testatrix's niece Mary Selina Charlotte, the wife of William Henry Berkeley, who became second Baron Portman on the death of the first baron in 1888. She died on January 3, 1899, leaving her husband and five children, all of whom were born in the lifetime of the testatrix. The eldest son Edward William Berkeley,

being the person entitled in remainder expectant on the death of his father to the barony, did not succeed to the Buxted Park Estate, but it passed on the death of his mother to the second son the plaintiff Henry Berkeley Portman under the appointment in the will. The second Lord Portman died in 1919, but in the meanwhile his eldest son had died in 1911 without leaving male issue, and the barony accordingly devolved on the plaintiff Henry Berkeley Portman, now Viscount Portman. Thereupon the shifting clause in the testatrix's will came into operation, and in accordance with the decision of Eve J. in *In re Harcourt. Fitzwilliam* v. *Portman* (1) the Buxted Park Estate passed to the third son, the defendant Claude Berkeley Portman, for life with remainder to his first and every other son severally and successively according to seniority in tail with remainder to the first and every other daughter successively according to seniority in tail with remainders over. The defendant Edward Claude Berkeley Portman is the eldest son of the defendant Claude Berkeley Portman.

A summons was taken out by Viscount Portman and his only child Selina Lusie Portman to have it determined whether on the true construction of the will of Colonel Harcourt the chattels thereby bequeathed to go and be held, so far as the rules of law and equity would permit, with the mansion house called Buxted Park or with the Buxted Park Estate as heirlooms as therein mentioned, belonged to the Viscount for life with remainder to his daughter absolutely, or to some other, and if so what, persons, and for what estates and interests.

Eve J. held that the shifting clause in the will of the testatrix infringed the rule against perpetuities and was therefore invalid as regards the chattels; and that, notwithstanding the passing of the estate by the operation of the clause, Lord Portman remained entitled to the enjoyment of the chattels for his life, the absolute interest in remainder being vested in his daughter Selina Lusie Portman

(1) [1920] 1 Ch. 492.

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as first tenant in tail, subject to be divested in the event of a son being born to Lord Portman.

The defendants Claude Berkeley Portman and his eldest son Edward Claude Berkeley Portman appealed.

Maugham K.C. and *Whinney* for the appellants. This case is covered by *In re Lord Chesham's Settlement* (1) from which it cannot be distinguished, and does not come within the rule in *Foley* v. *Burnell.* (2) There is sufficient indication here that the testator intended that the chattels should vest only in a tenant in tail in possession.

It is said that the shifting clause is void as to the chattels as infringing the rule against perpetuities. But the provision is divisible and may be read as applicable to each son of Lady Portman: *Miles* v. *Harford* (3); *Harrington* v. *Harrington.* (4)

The gift is to a series of persons who shall be respectively entitled for the time being to hold and enjoy the said mansion house. Such a gift may be good as to one person of the series though bad as to others. As to the realty the gift is not void for perpetuity because the estate tail may always be barred. It is submitted there is no qualification as to the gift of the chattels, and that that also is not void for perpetuity. The rule is undoubted that every estate tail may be barred, and therefore that there is no perpetuity as regards the realty. Why should that not apply to chattels which are given to go with the real estate? The chattels cannot be tied up for one moment longer than the real estate.

As to the words "so far as the rules of law and equity will permit," no doubt the trust is not executory, but it has never been said that the words cannot be regarded. They will not of course have any effect if the testator has tied up the property in such a way that there must be a perpetuity: *Christie* v. *Gosling.* (5) The same thing was said in *Harrington* v. *Harrington.* (6)

(1) [1909] 2 Ch. 329.
(2) 1 Bro. C. C. 274.
(3) (1879) 12 Ch. D. 691.
(4) (1868) L. R. 3 Ch. 564; L. R. 5 H. L. 87.
(5) L. R. 1 H. L. 279, 290.
(6) L. R. 3 Ch. 574; L. R. 5 H. L. 102.

Having regard to the expressed intention of the testator the second plaintiff can take no interest in the chattels unless she is entitled to "hold and enjoy" the mansion house. She never can be so entitled, and the appellants rightly claim the chattels.

Romer K.C. and *H. T. Method* for the respondents. On the question of perpetuity it is necessary to look at the date of the testator's death, and if the gift is such that the limits of the law against perpetuity may be exceeded then the limitation is void. What is the effect in law of a bequest of chattels to go to the owner for the time being of an estate? If they are to go as heirlooms they do not vest in the first owner, and the Court will consider the limitations of the real estate.

In *Tollemache* v. *Coventry* (1) there was an attempted gift of chattels to go and be held with a title.

Lord Hatherley when he was Vice-Chancellor laid it down quite clearly in *Lord Scarsdale* v. *Curzon* (2) that in a case of this sort where the trusts are executed the Court will look to the limitations of the realty and will vest the personalty according to those limitations, and when you arrive at a person who is tenant in tail of the realty you must give the personalty absolutely to him. An absolute interest in personalty may be given to go over so long as the event on which it is to go over must happen within the limits of the law against perpetuity. That is not so in this case. The shifting clause may have the effect of divesting these chattels at a time long beyond the limits of the law of perpetuity. The shifting clause therefore is invalid as to the chattels: *Miles* v. *Harford.* (3) You must look at the limitations as they exist at the date of the testator's death. You cannot consider who from time to time is entitled in possession. It is said that inasmuch as a tenant in tail can by disentailing get rid of the shifting clause as to the realty by parity of reasoning the same thing applies to the chattels. There is no such exception from the rule against perpetuity. It makes no

(1) (1834) 2 Cl. & F. 611. (2) (1860) 1 J. & H. 40, 49.
(3) 12 Ch. D. 691.

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difference whether the gift of the chattels is contained in the same instrument with the limitations of the realty. There cannot be a different rule of construction in such a case from that which has to be applied when the will deals with the personalty by reference to the limitations of real estate contained in another instrument. On that point the appellants relied on *Harrington* v. *Harrington*. (1)

The rule in *Lord Scarsdale* v. *Curzon* (2) draws no such distinction. We rely on what Lord Hatherley said in that case.

Again the testator cannot avoid the rule against perpetuities by using the words "so far as the rules of law and equity permit." The answer is that they do not permit, and the shifting clause is invalid as regards the chattels.

Where there is a shifting clause relating to real estate with a gift of chattels by reference to the limitations of the real estate conveyancers use words to provide for that: 2 Key & Elphinstone's Precedents in Conveyancing, 10th ed., p. 784; Davidson's Precedents, 3rd ed., vol. iii., Part I., p. 624.

A tenant in tail, by barring the entail does not get rid of the shifting clause so far as it operates on the gift of the chattels.

Hogg v. *Jones* (3) affords an example of the application of the rule laid down by Wood V.-C. in *Lord Scarsdale* v. *Curzon*. (2)

In *In re Lord Chesham's Settlement* (4) the Court of Appeal adopted a construction quite different from the meaning long accepted by conveyancers. That case has frequently been distinguished: see *In re Parker* (5); *In re Beresford-Hope* (6); and *In re Lewis*. (7) The general rule was laid down in *Foley* v. *Burnell* (8), and except in a case identical with *In re Lord Chesham's Settlement* (4) *Foley* v. *Burnell* (8) must be followed.

(1) L. R. 5 H. L. 87, 98.
(2) 1 J. & H. 49.
(3) (1862) 32 Beav. 45.
(4) [1909] 2 Ch. 329.
(5) [1910] 1 Ch. 581.
(6) [1917] 1 Ch. 287, 295.
(7) [1918] 2 Ch. 308.
(8) 1 Bro. C. C. 274; 4 Bro. P. C. 319.

Whinney in reply referred, in addition to the other authorities cited, to *In re Hill* (1) and to Gray on Perpetuities, 2nd ed., p. 334, § 399.

Dighton Pollock for the trustees.

Cur. adv. vult.

July 5. LORD STERNDALE M.R. This appeal from Eve J. raises a question of the ownership of certain valuable pictures, books, plate and other chattels bequeathed by the will of the testator Colonel Francis Vernon Harcourt to go and be held so far as the rules of law and equity will permit as heirlooms with a mansion house and estate known as Buxted Park. In order to see the dispositions with regard to that mansion house and estate it is necessary to refer to the will of Colonel Harcourt's wife, Lady Catherine Julia Harcourt, made in 1872. Colonel Harcourt signified his assent to her will by signing it. There were codicils made afterwards in 1872, 1873, 1874, 1875 and 1877 but, they do not affect the questions in this case. [The Master of the Rolls then referred to the will and continued :] The testator Colonel Harcourt by his will made in 1874 made these dispositions as to chattels so far as Buxted Park is concerned: "I give and bequeath the Sèvres china flower stand given to the Right Honourable Robert Banks Earl of Liverpool by the Emperor Napoleon the First and also a water color drawing of Athens by my said wife and two water color drawings by T. M. Richardson given by me to my said wife to go and be held so far as the rules of law and equity will permit with the mansion house called Buxted Park as heirlooms and to be held and enjoyed accordingly in succession by the several persons who shall be respectively entitled for the time being to hold and enjoy the said mansion house I also give and bequeath all my plate and plated articles and linen unto the said William Henry Berkeley Portman and Edward William Harcourt their executors and administrators In trust to permit my said wife to have the use and enjoyment thereof for and during the term of her

(1) [1902] 1 Ch. 807.

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natural life And from and after her decease Upon trust to permit all such plate and plated articles as are marked with " certain marks, and certain other chattels specifically mentioned there " to go as heirlooms so far as the rules of law and equity will permit with the Buxted Park Estate And all such plate and plated articles as are marked with " certain marks and certain other chattels " to go as heirlooms so far as the rules of law and equity will permit," with a certain other estate, not Buxted Park. Then he goes on : " And I give and bequeath all the household goods furniture books pictures and china which shall be in or about my said mansion house called St. Clare and also in and about my said mansion house called Buxted Park respectively at the time of my decease unto the said William Henry Berkeley Portman and Edward William Harcourt their executors and administrators In trust to permit the said household goods furniture books pictures and china respectively to go and be held as far as the rules of law and equity will permit with the said mansion houses called St. Clare and Buxted Park respectively as heirlooms according to the limitations thereof respectively which shall be respectively subsisting under this my Will or otherwise howsoever at the time of my decease and to be held and enjoyed accordingly in succession by the several person or persons who shall be respectively entitled for the time being to hold and enjoy the said mansion houses respectively." It will be noticed that the words of the bequests of chattels differ. Some are perhaps rather more in favour of the first contention of the appellants in this case than others, but in substance, I think the effect is the same. I do not think that the fact that the dispositions of chattels in the testator's will are made by reference to those of the realty in his wife's will is material. I think that in some cases the fact that dispositions are made by reference to another document which may never come into operation may be important ; but in the circumstances of this case I can see no such importance. It may be that the testator, although he signed his wife's will for another purpose, may not have troubled himself about the dispositions as to Buxted

Park, and he may have thought that his wife was just as likely to survive him as he to survive her. But she predeceased him and after her death he confirmed his will in three codicils, two dated in 1878 and one in 1880. In the first of these codicils he refers to his wife's death and makes an alteration in his will apparently occasioned by her death. At the time of making these codicils he realised that his wife's death might make some alteration of the provisions of his will necessary. He had the opportunity of knowing and I think must be taken to have known the contents of her will and on these occasions he deliberately confirmed his own, which in the words "or otherwise" contained in the third bequest of chattels showed that he intended the limitations of his wife's will to a certain extent to govern those of his own. I think in these circumstances the effect is exactly the same as if the limitations both of realty and personalty were contained in the testator's own will and that for the purposes of the shifting clause mentioned later Eve J. is right in saying that the trusts of the personalty should be written out in extenso corresponding as near as may be to the limitations of the realty.

Lady Catherine Julia Harcourt died in 1877 and the testator in 1880. The niece mentioned in Lady Catherine Julia Harcourt's will died in 1879, and on her death the first plaintiff, W. H. B. Portman, now Viscount Portman, succeeded to Buxted Park as first tenant for life. His daughter the second plaintiff, at present his only child, was born in 1903. In 1919 he succeeded to the Barony of Portman; thereupon his interest in the Buxted Park Estate by reason of the shifting clause, to be discussed later, ceased as if he were dead without issue of his body, and the defendant C. B. Portman became tenant for life of the Buxted Park Estate. The defendant E. C. B. Portman who was born in 1898 is his son and the present tenant in tail. In these circumstances the question is whether the chattels vested absolutely in the second plaintiff, who on her birth became entitled under the will of the testatrix to a vested estate of inheritance in remainder expectant on the death of her father subject to

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defeasance in the event of a brother being born and to the effect of the shifting clause, or whether she takes no interest in them because she can never come into actual possession of the property.

The general rule in matters of this description is laid down by Lord Hatherley when Vice-Chancellor in *Lord Scarsdale* v. *Curzon* (1), thus: "First: That an assignment or bequest of personalty, either immediate or by way of trust executed, to go according to the same limitations as real estate, vests it absolutely in the first tenant in tail of the realty immediately upon his birth, and this whether the limitations of the personalty be expressed in extenso, or created by reference to the limitations of the realty; and that such reference may be effectually made either by expressly saying that the chattels are to go on the same uses as the realty, or by declaring that they are to be treated as heirlooms, this last expression being sufficient in itself to carry the property in the way I have stated." But this rule may of course be controlled by the language of the will under consideration, and that language may manifest an intention that the chattels shall not vest in any tenant in tail who does not come into actual possession of the mansion house.

The first, and, in my opinion, the vital question to be decided in this case is, whether the words of this will do show this intention. There is no question that the testator intended that the chattels and the mansion house should go together so far as law and equity would allow; he says so in so many words; and I think it a fair inference that he would have wished the chattels not to pass to any one who did not come into possession of the mansion house, and if he had been asked whether he wished a clause to that effect to be put into his will he would very likely have said that he did. But we have not to decide what we think was in the testator's mind; that is a matter of opinion on which certainty is not possible. What we have to decide is whether he has, by the words used in his will, expressed that intention directly or impliedly.

(1) 1 J. & H. 40, 50.

I think it is relevant to notice one or two matters as to which there can be no dispute. First, the word possession or possess is not used anywhere in the will although it was evidently a well-known word in such a connection, as is shown by *Harrington* v. *Harrington*. (1) Secondly, a clause which would have put this intention beyond a doubt would have been very easy to draft as is shown by that and other cases, and there is no such clause. On the language as it stands I do not say that I might not have come to the conclusion to which Eve J. in the same circumstances would have inclined, that is, that the testator did mean possession of the chattels to go only with possession of the mansion house, but I do not consider that I am at liberty to do so. I know that the effect of authority in the construction of wills where the governing problem is to find the testator's intention has been much discussed and often minimised and denounced, notably by so great a judge as Sir George Jessel, and it is often a very unsafe guide. But it must always be remembered that the problem is to discover the testator's intention by interpreting the words he has used in the circumstances existing at the time of his will and not by guessing at what he would have wished or what words he would have used if he had foreseen the facts as they now appear. I think also that when a testator has used words which have acquired a definite meaning in conveyancing and have for a long time been used in the drafting of wills and settlements and other like documents with that meaning, it requires a very strong case to justify their interpretation in a different sense. The result may well be that by so construing them in a particular case in order to carry out what the Court thinks the testator would have wished, an object which he could have obtained without difficulty by using clear and unambiguous words, the result may be produced of upsetting the intentions of testators and settlors in other cases when the words have been intentionally used in the meaning attached to them at the time they were used, a meaning which had attached to them long before. In my opinion, the words used in this will do not

(1) L. R. 5 H. L. 87.

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differ in any substantial respect from those used in a long series of authorities to which we were referred in which they have been held to bear the construction put upon them in this case by Eve J. in accordance with the words of Lord Hatherley. The strength of the appellants' contention so far as the actual words are concerned was based upon the word "enjoyed," but I cannot find that this differs materially from the words used in the authorities to which I have referred. The principal of these are: *Foley* v. *Burnell* (1), a case in the House of Lords; *In re Parker* (2), a decision of Lord Parker, then Parker J.; *In re Beresford-Hope* (3) (Eve J.); and *In re Lewis* (4) (Astbury J.). The same meaning has been attached to them by well-known writers on conveyancing.

The appellants relied upon *In re Lord Chesham's Settlement* (5) as establishing their construction of the words. As will be pointed out more clearly by Warrington L.J., the actual decision in that case is not in point, but the learned judges did use language favouring the appellants' contention. The case has however been much criticised by writers on conveyancing, and in some of the authorities to which I have referred, and it has not been generally followed though it was mentioned without disapproval by Peterson J. in *In re Fowler.* (6) It may be distinguished, as may some of the other cases, by a minute criticism of words, but I think this is not satisfactory. I can see, as I have already said, no substantial difference in the words used in all those cases and in the present; and I think I ought to follow what seems to me a uniform system of interpretation broken only by the isolated case of *In re Lord Chesham's Settlement.* (5)

Looking to what I consider the importance of maintaining a long-established meaning of words commonly used in documents such as that now under consideration and the serious consequences which may follow from departing from that long-established meaning, I think I ought to construe

(1) 1 Bro. C.C. 274; 4 Bro. P.C. 319.
(2) [1910] 1 Ch. 581.
(3) [1917] 1 Ch. 187.
(4) [1918] 2 Ch. 308.
(5) [1909] 2 Ch. 329.
(6) [1917] 2 Ch. 307, 323.

the words in this case as they were construed by Eve J. and that if an alteration is to be made in the adopted construction of such words it should be made by a tribunal having the authority of a final Court of Appeal, especially as one of the cases pointing in favour of the adopted construction is a case in the House of Lords. On that construction the chattels vested in Selina Lusie Portman absolutely, and in the absence of a son of her father can only be taken away from her by the shifting clause to which I have referred. [His Lordship read the shifting clause and continued:] With regard to its bearing on the realty no question arises as to the effect of the rule against perpetuities on this clause. It is well settled that since all conditions in defeasance of an estate tail can be destroyed by barring the entail no objection on the ground of its tending to a perpetuity can be taken to such a clause so far as it relates to realty. This doctrine does not apply to chattels, and therefore, if this clause offends against the rule as to perpetuities it can have no effect on the chattels. The solution of this question does not depend upon ascertaining the testator's intention from the language of his will. I think there can be no doubt that his intention was that the ownership of the chattels should shift with that of the mansion house, and the question is whether the law permits that intention to be carried out. It is, I think, clear that the proper way to approach this question is to discover the meaning of the clause and ascertain whether, read with that meaning, it can possibly have an operation outside the period permitted by the rule against perpetuities. If it can have such an operation it is void, and it is not permissible to have regard to the fact that in the actual events that have happened the operation of the clause falls within the period. I think, looked at in this way, the clause clearly might have an operation beyond the permitted period, for it might apply to a son of the niece mentioned, born after the testator's death, who succeeded to the title more than twenty-one years after the determination of lives in being at such death and was therefore void.

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It was, however, contended by the appellants that the shifting clause was divisible, and should be read as applying to each son severally and individually, and that so read it was unobjectionable. In support of this contention great reliance was placed upon the case of *Harrington* v. *Harrington*. (1) I think that as between son and remoter male issue it would be possible to divide the clause, but I do not think that can be done as between the sons, and I do not think that the case cited is any authority to the contrary. The question in that case was not whether an estate which had vested could be divested by a shifting clause such as this, and the clause under consideration there was not a shifting clause at all but a clause imposing conditions upon the vesting of the property and might be read as applying to each interest affected by it, and even if that clause were so read it would be no authority for so reading a shifting clause such as that under consideration.

Great reliance was placed upon the language of Lord Cairns, but I do not think that the noble and learned Lord expressed any opinion in favour of the divisibility of such a clause as this. All that he seems to me to have done was to point out that even if the clause which he was considering could be split up, it would, in that case, be of no help to the appellants; and even in that case he did not decide that splitting up was right, but only assumed it for the purpose of showing that, even if it were assumed, it was then of no use. That case shows, in my opinion, that if the clause be not divisible and be in contravention of the rules as to perpetuity, it is not cured by the words "so far as the rules of law and equity will permit." I think to hold this clause divisible would be to strain the words and put an unnatural meaning upon them in order to escape a distasteful result, and would be contrary to the rule laid down by Lord Selborne in *Pearks* v. *Moseley*. (2)

For these reasons I think the conclusion of Eve J. was correct and the appeal should be dismissed; but I think the order should be framed so as to make it only a

(1) L. R. 5 H. L. 87. (2) (1880) 5 App. Cas. 714, 719.

determination as between the parties to these proceedings—one that in no way affects the rights of persons not parties to them.

WARRINGTON L.J. The question in this case arises in reference to the title to certain chattels by the will of Francis Vernon Harcourt bequeathed as heirlooms to be held along with the Buxted Park Estate devised by the will of his wife Lady Catherine Julia Harcourt.

The chattels are claimed on the one hand by Henry Berkeley, the present Viscount Portman, who succeeded to the Barony of Portman on the death of his father on October 16, 1919, and by his infant daughter Selina Lusie Portman, and, on the other hand, by his younger brother Claude Berkeley Portman and his son Edward Claude Berkeley Portman. Until the death of his father the present Lord Portman was tenant for life of the Buxted Park Estate with remainder to his only daughter Selina Lusie Portman in tail, her estate being liable to be defeated by the birth of a son. On succeeding to the title, however, his estate and those of his issue in tail were determined by the operation of a shifting clause contained in the will of Lady Catherine Julia Harcourt, and the estate passed to Claude Berkeley Portman for life with remainder to his issue in tail; Edward Claude Berkeley Portman is now tenant in tail in remainder.

It is contended on behalf of Lord Portman and his daughter that the shifting clause as regards chattels infringes the rule against perpetuities and it is insisted that notwithstanding the passing of the estate Lord Portman remains entitled to the enjoyment of the chattels for his life and that the absolute interest remains, vested in Selina Lusie Portman as first tenant in tail of the estate. Eve J. has accepted this view, and Claude Berkeley Portman and his son appeal.

Lady Catherine Harcourt died on December 5, 1877, and Colonel Harcourt more than two years later—namely, on April 23, 1880. By his will which was dated January 3, 1874, he bequeathed the chattels in question in three separate

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classes. [His Lordship read the provisions of the will relating to the chattels and continued :] The explanation of the expression "under this my Will or otherwise" is, that in the same bequest there were included chattels in another house to go with it as heirlooms, that house being settled by his own will. For clearness I have only transcribed that part of the bequest which disposes of the chattels at Buxted.

The following points are to be noted in reference to these bequests. First, in no case is the word "possession" used in connection with either the house or the estate. Secondly, in the first and third the chattels are to go and be held along with the mansion house whereas in the second they are to go and be held along with the estate. Thirdly, in the third bequest and in that alone the subsisting limitations of the mansion house are referred to, such limitations being in fact created "otherwise" than by his will. Fourthly, in the first and third bequest the chattels are "to go and be held" with the mansion house whereas in the second they are to "go" as heirlooms with the Buxted Park Estate. Fifthly, in the first and third bequest the chattels are to be "held and enjoyed" by the persons referred to ; in the second they are "to be used and enjoyed." The first of these points, which is common to all the bequests, may be of importance in reference to one of the decided cases which will be referred to hereafter. As to the others I have thought it right to mention the variation of language to show that I have not forgotten it, but I may say at once that it has not, in my opinion, any bearing on the construction and effect of the several bequests which I think must be treated as on the same footing.

After the death of his wife Colonel Harcourt made three codicils to his will, in the first of which he alludes to his wife's death and makes certain consequential alterations in his will, and by that and the second codicil he expressly confirms his will. [His Lordship then stated the terms of Lady Catherine Harcourt's will and read the shifting clause, and continued :] As regards the settled hereditaments this clause was protected

from being invalid as infringing the rules against perpetuity by the well-known doctrine that since all conditions in defeasance of an estate tail can be destroyed by barring the entail such conditions, though otherwise tending to a perpetuity, can be supported. This doctrine does not apply to personalty, and accordingly if the shifting clause according to its true construction might effect a divesting of personal estate at a period exceeding that allowed by the rule against perpetuities—namely, a life or lives in being at the death of the testator and twenty-one years afterwards—it would be void.

In applying the rule to the present case it is of course the death of Colonel Harcourt, not that of his wife, which is the point of time at which the permitted period begins. It is a well-settled rule that such a clause must be construed fairly without reference to the rule against perpetuities, which only comes into operation, if at all, when the proper meaning has been ascertained. Moreover, the rule must be applied if in possible events the operation of the clause may be outside the period, and it is not a legitimate mode of procedure to consider its operation in actual events.

The clause provides that if any son or remoter male issue of Lady Portman should become entitled to the barony the estates are to shift. Lady Portman survived the testator, and it is clear that the words would include a son of hers born after the death of the testator; and as such a son might succeed to the title more than twenty-one years after the determination of lives in being at the death of the testator, the shifting clause does infringe the rule against perpetuities inasmuch as the event on which it is to operate may happen beyond the prescribed limits. But it is said the provision is divisible and may be read as applicable severally to each son of Lady Portman. It may be that as between the sons and their issue male the clause is divisible (*Miles* v. *Harford* (1)), but as between the sons themselves I can see no ground for so reading it.

Great reliance was on this point placed by the appellants'

(1) 12 Ch. D. 691.

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counsel on *Harrington* v. *Harrington* (1), but, in my opinion, that case has no application to the present. The clause there in question was not a shifting clause divesting a previously vested interest, but was a condition of the vesting of the interest itself, and could therefore properly be read as applicable separately to each interest affected thereby: see per Lord Hatherley L.C. (2) In my opinion, therefore, the provision in this present case would not operate to divest an interest in personalty to which but for its invalidity in point of law it would be applicable.

Who then were entitled, and for what interests therein, to the chattels at the time when the present Lord Portman succeeded to the title? Under the limitations of the will of Lady Catherine Harcourt, Henry Berkeley Portman became entitled on the death of his mother as her first son, not entitled in possession or immediate remainder to the Barony, to a life estate in possession in the Buxted Park Estate. On the birth in 1903 of Selina Lusie, at present his only child, she became entitled to a vested estate in tail in remainder subject to be divested by the birth of a son.

Under the bequest of the chattels Lord Portman became entitled to the possession of the same for his life, but inasmuch as the rules of law do not permit of an inheritable estate in chattels his daughter's vested estate tail in the realty in remainder became in the chattels an absolute interest vested in her at birth as was the estate in the realty, but with actual possession postponed till her father's death and liable to be divested by the birth of a son who would then take her place. It is in this way that the words "as far as the rules of law and equity will permit" have their operation. If the limitations of the real estate themselves exceeded the limit prescribed by the rule against perpetuities these words might have the further effect of confining the bequest of the chattels within those limits, but in the present case there is no necessity for resorting to them for this purpose, inasmuch as the estate of the first tenant in tail must vest within the legal limit and the corresponding interest in the chattels so vests also.

(1) L. R. 3 Ch. 564; L. R. 5 H. L. 87. (2) L. R. 5 H. L. 99.

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On the death of his father in 1919 Henry Berkeley Portman succeeded to the barony; and thereupon, by virtue of the shifting clause, his interest and that of his daughter and a possible son in Buxted Park ceased, and the estate passed to his next brother Claude for his life with remainder to his son Edward in tail. But the shifting clause is, as I have already pointed out, not operative as regards chattels, and inasmuch as it is that clause, and that alone, which has brought about the divesting of the estate, the title to the chattels remains unaffected. Lord Portman is still tenant for life in possession, and his daughter is, subject to his life estate and to the interest of a possible son, still the absolute owner thereof, though not entitled to possession until her father's death.

But it is said on behalf of the appellants that the gift of the chattels is to a series of persons—namely, those for the time being entitled to the Buxted Estates, and that we are not concerned with the means by which they respectively become so entitled. To give effect to this contention would, in my opinion, be to depart from well-settled principles regulating the construction of gifts of chattels as heirlooms to go along with a settled estate. The principle was thus expressed by Wood V.-C. in *Lord Scarsdale* v. *Curzon* (1): "The great contest in every case . . . . has been, not on the point as to possession, but upon the more general question as to the construction and effect of an instrument which contains a series of limitations of realty in strict settlement, and by which chattels are annexed to the estate by making them heirlooms, or by directing that they are to follow the limitations of the realty, or by using any other equivalent form of words. Upon this, the authorities have settled, that, where the trusts are executed . . . . the Court will deal with the limitations in this way: it will simply look to the limitations of the realty, and will vest the personalty according to those limitations—the consequence of which is, that, when you arrive at a person who is tenant in tail of the realty, you must give the personalty absolutely to him."

(1) 1 J. & H. 49.

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In support of the contention I am dealing with the appellants rely on *In re Lord Chesham's Settlement.* (1) But, in my opinion, that case has nothing to do with the point in question. The question there was whether, according to the true construction of the will, the chattels vested in a tenant in tail who died while still entitled only in remainder. In arriving at the conclusion that they did not the learned judges relied on the view that on the construction of that will the testator intended that the chattels and the actual possession of Latimer House should go together and that therefore a person who had never been, and could never be, in possession of the house had no vested interest in the chattels, but I am satisfied that they never intended to depart from the general principles upon which bequests of chattels as heirlooms to go with settled realty are dealt with by the Court.

In the present case the point actually decided in *In re Lord Chesham's Settlement* (1) does not arise, for Lord Portman's daughter is still alive and may survive her father, and it is unnecessary to express any opinion upon it; and, in fact, it would be improper to do so inasmuch as we have not before the Court the persons interested should the event happen on which the point will arise.

I may, however, say this, that the application of that case to the construction and effect of another document is one that requires very serious consideration. It has already been distinguished in *In re Parker* (2) (a case in which the words favourable to such a construction as that adopted in *Lord Chesham's Case* were very strong), in *In re Beresford-Hope* (3), and in *In re Lewis.* (4) It is also very difficult to reconcile the decision with *Foley* v. *Burnell.* (5)

The order appealed from declares, and, I think, rightly, that the chattels are vested absolutely in the plaintiff Selina Lusie Portman subject only to be divested by the birth of a son to Lord Portman, and to the life interest to the latter. If it is desired that a statement be added that the declaration

(1) [1909] 2 Ch. 329.
(2) [1910] 1 Ch. 581.
(3) [1917] 1 Ch. 287.
(4) [1918] 2 Ch. 308.
(5) 4 Bro. P. C. 319.

is to be without prejudice to any question which may arise in the event of her dying in her father's lifetime so that she would never have been entitled in possession to the Buxted Park Estate even if the shifting clause had never taken effect, this may be done, but, in my opinion, on the facts as they now exist the order is correct and ought to be affirmed and this appeal dismissed.

YOUNGER L.J. Two main questions arise on this appeal, each separate and distinct from the other. The first of these is whether the appellants, now entitled in succession one after the other to the Buxted Park Estate, are debarred by the rule against perpetuities from obtaining the chattels which according to the terms of the testator's will are bequeathed to them in that character, and the second question, if the appellants are so debarred, is whether the respondents, Lord Portman and his daughter, can under the terms of the same will sustain any claim at all to these chattels seeing that all interest of theirs in the Buxted Park Estate present and prospective has now entirely determined.

Counsel for the appellants were well advised to deal with these questions in the order in which I have stated them. Unless the appellants can make good their contention on the first question all title of theirs to the chattels is gone. True they may not have to yield them up to the respondents, whose title if they fail to make good their position on the second question, would be no better than that of the appellants should they fail on the first. But the appellants' ability to retain the chattels would in that event only continue until the real owners, who in the case supposed would be the testator's residuary legatees, came forward to demand them. Accordingly their true interest is to maintain the claim that their title otherwise undoubted is not affected by the rule against perpetuities, and I shall therefore at once proceed to the consideration of that question.

At the testator's death the Buxted Park Estate stood limited by Lady Catherine Harcourt's will on trust for her niece, afterwards Lady Portman, for her life and at Lady Portman's

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death upon the trusts which, fully set out in the judgment of the learned judge, have with the shifting clause just been detailed by the Lord Justice. I may treat them as present to the minds of all persons interested in this judgment, without again repeating them.

Now, there can, I think, be no doubt that the shifting clause in question, had it not been capable of destruction by the barring within the time limit permitted by the rule of the estate tail to which it was amongst other estates appendant (an operation which we were told has now been carried out by the appellants), would in the limitations of the Buxted Park Estate have transgressed the rule against perpetuities even as at the death of the testator which for present purposes is the relevant date. It might well have happened that a son of Lady Portman unborn at the testator's death having previously become entitled to the property for an estate tail, had succeeded subsequently to the Barony of Portman, thus making the shifting clause applicable to his estate at a date more than twenty-one years after the death of his mother. But the shifting clause, notwithstanding the fact that, if left operative, it would in such a case have transgressed the rule, and would therefore have been altogether void, was made valid, as has been stated, by the application to it of the principle that as all conditions in defeasance of an estate tail are capable of being destroyed by barring that estate, they are, however phrased, really only operative as conditions imposed by the testator or settlor within the permitted limits, for within these limits an estate tail, properly limited, immediately on the cesser of an existing life, as each of these is, is always barrable; that is to say, the shifting clause, after the permitted period has expired, is dependent for its continued operation upon the will of the tenant in tail entitled to the estate, and is no longer operative by the will of the testator who framed it, or, stating the position in terms more closely applicable to the circumstances of the present case, the limitations of the Buxted Park Estate contained in Lady Catherine's will, shifting clause and all, did not infringe the rule against perpetuities because, notwithstanding that

clause, these limitations permitted of the estate being indefeasibly vested in a tenant in tail in possession within the limit of existing lives and twenty-one years afterwards; and this has in fact been held to be the case by a previous decision of the learned judge which is now binding upon all parties. (1)

Now, as it has turned out, it is to the persons so entitled in succession to an estate so circumstanced that the gifts of the Buxted heirlooms are made by the testator's will. Moreover, and this for present purposes is the essentially important thing, the gifts are made with no condition attached to them, with, for example, no such condition as the common one, that they shall not vest in any beneficiary under twenty-one; or, to take another more apposite in the present case, no condition against any Lord Portman retaining or succeeding to any of the heirlooms. The only qualification required by the testator in a beneficiary of these chattels is ownership for the time being of Buxted Park—nothing more.

Now, the operation of such a gift is up to a point well settled. I take it conveniently from the passage from Lord Hatherley's judgment in *Lord Scarsdale* v. *Curzon* (2), already cited by the Lord Justice, and now transcribed in full: "The great contest in every case, except *Foley* v. *Burnell* (3) (where the question as to possession did come under discussion), down to the very latest, *Rowland* v. *Morgan* (4) has been, not on the point as to possession, but upon the more general question as to the construction and effect of an instrument which contains a series of limitations of realty in strict settlement, and by which chattels are annexed to the estate by making them heirlooms, or by directing that they are to follow the limitations of the realty, or by using any other equivalent form of words. Upon this, the authorities have settled, that, where the trusts are executed (for there still seems to be a doubt remaining with reference to executory trusts), and where no restriction as to the attainment of the age of twenty-one, or the fulfilment of any other condition is introduced, the Court will deal with such limitations

(1) [1920] 1 Ch. 492.
(2) 1 J. & H. 49.
(3) 4 Bro. P. C. 319.
(4) (1848) 6 Hare, 463; 2 Ph. 764.

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in this way: it will simply look to the limitations of the realty, and will vest the personalty according to those limitations—the consequence of which is, that, when you arrive at a person who is tenant in tail of the realty, you must give the personalty absolutely to him," which statement I would complete by adding from the judgment of Lord Parker in *In re Parker* (1), this further observation, that the absolute interest so taken by the tenant in tail is "subject of course to his interest being defeated by any event which would defeat his estate in the realty"; and I append for myself this further caveat necessary in the present case, that the event in question, if it is to be effective, must occur within and must not occur outside of the limits of time permitted by the rule against perpetuities.

Now, here, the trusts of the chattels are executed; there is no restriction as to the attainment of the age of twenty-one or the fulfilment of any other condition on the part of the legatee introduced, this, as I have said, being for present purposes the vitally important point. The question, therefore, and the only question which on this part of the case the Court has to ask itself is this: Was it or was it not possible at the death of the testator to affirm that notwithstanding the shifting clause in Lady Catherine's will, there must be some person who would within the limits of perpetuity take an indefeasible interest in the Buxted heirlooms as bequeathed by the will? If that question can be answered in the affirmative the title of the appellants to these heirlooms is complete. And I think the affirmative is the proper answer to the question. The reason for this opinion, if I be so far right, is not difficult to state. It may be given in the words of Lord Hatherley and Lord Parker just quoted. The event which in Lord Parker's words could alone defeat the interest of Lord Hatherley's tenant in tail of the estate to whom, as such, the chattels are given absolutely, can never in the present case be operative against his will after the expiration of the limited time within which the rule requires that the chattels shall vest indefeasibly. The shifting clause, the

(1) [1910] 1 Ch. 584.

operative event here as a condition, is attached to the realty only. As so attached it ceases at the will of the tenant in tail within the necessary limit of time to have effect; thereafter the limitations are, as if there were no shifting clause existent, and that clause is never, by the testator's will, attached as a condition to the heirlooms at all. Had it been so attached by the testator to his gifts of these heirlooms, very different would have been the result. The gift would not have been one "without condition"; Lord Hatherley's rule would not have applied, and the course taken by the learned judge of writing out the gift of the chattels in a form corresponding as nearly as might be to the limitations of the Buxted Park Estate, including the shifting clause, and then determining whether such a disposition of personal chattels was valid or not, would have been permissible. And that course adopted, the result reached by the learned judge would have been inevitable, for there is no such thing as an estate tail in chattels either to be barred or at all. The destruction of the shifting clause, as applied to them, after the limits of perpetuity had been passed, would have been impossible. The whole clause, therefore, would have been void, no interest in the heirlooms could under it have passed to the appellants.

But in the present case there is no room for taking any such course; the words of the will neither require it, nor, as I think, do they permit of it. Here again the absence of any condition from the gift is vitally important. The testator has not, as I have already said, required that his heirlooms shall not be enjoyed by a Lord Portman. There is no warrant for reading that condition into his gift, as would in effect be done by taking the course the learned judge has taken. Nor is there any greater warrant for doing so, I need hardly say, from the fact that, paradoxically enough, the course if taken assists, and if the learned judge's declaration stands, succeeds, in bringing about with regard to the heirlooms the very result which the shifting clause as applied to the estate was designed to prevent and has so far succeeded in preventing. But all that is outside the

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terms of the gift. By these terms the heirlooms follow the owners of the estate in succession, whoever they may be, so long as the rules of law and equity will allow, and following that ownership, as limited at the testator's death—the only permissible course—it is found that notwithstanding the shifting clause they must, within the prescribed limit of time, devolve upon one of these successive owners for what he can make at his will an indefeasible interest. The shifting clause within the permitted limits of time ceases to affect the realty and from that moment ex necessitate rei, and, for the same reason, the heirlooms are as indefeasibly vested as is the realty: vested as if there had been intermingled with the limitations of the realty to which alone it is applicable no shifting clause at all.

And if the words of this will do not require that the test of the learned judge should be applied no justification for adopting it can be found in any other direction. For see how remarkable is the result of taking that course. Under dispositions by the terms of each of which the testator has manifested a desire not to infringe the rule against perpetuities—a most important consideration—the otherwise undoubted title of the appellants—a title not, be it observed, in fact infringing the rule if it be recognized—is displaced by making that title dependent upon the validity as applied to personalty, of dispositions of realty perfectly good in relation thereto and by the will in which they are contained applied only to realty; and that in a case where these dispositions are not only not referred to by the testator as those with reference to which his bequests of these chattels were made, but were not the dispositions with reference to which, as will later appear, it was in his direct contemplation that his chattels should be enjoyed. In other words the validity of an unconditional bequest in terms like the present would be made to depend upon a mere accident of form in the dispositions of somebody else not, it may be, even known to the testator.

Now, while the Court must steadily maintain the rule against perpetuities where it finds it applicable, I am not

aware that, contrary as I think to the directions of a testator and in a case where actually the rule has not been, and cannot now be evaded, it is called upon to embark upon a diligent search to find some trace of its breach in a clause brought into existence by itself for the purpose. But it is said that there is no direct authority to be found in favour of the view I have just expressed. Equally, I may say in answer, no authority against it has been cited. I can myself detect no flaw in the chain of reasoning on which the conclusion depends, a conclusion which to my mind is, at least, implicit in the statements of Lord Hatherley and Lord Parker to which I have called attention; while it is no more than an application to chattels made possible by the circumstances of this case, of principles well settled with reference to the realty to the ownership of which they are attached. And indeed the absence of direct authority may well be due to the fact that in the cases of this present class in which questions under the rule have arisen, the conditions creating the difficulty have been expressly attached to the personalty and not, as here, to the realty only, so that in these cases there has been no room for dealing with the question in the manner which, as it seems to me, is in this case alone permissible. See, e.g., *Tollemache* v. *Coventry* (1) and *Christie* v. *Gosling*. (2)

Further reasons were urged by the appellants leading to the result just stated. It is possible also that a similar conclusion may be reached in a more direct manner by exploring the opening to that result indicated by Lord Hatherley in *Harrington* v. *Harrington* (3), or by adopting Lord Westbury's judgment in the same case. As however I have reached a conclusion on a ground which conflicts with no previous authority I am content, as is more proper, to leave these questions to others without further discussion by me, and I base my acceptance of the appellants' contention on the simple ground just stated and thus arrive at the conclusion that the respondents (I use this

(1) 2 Cl. & F. 611. (2) L. R. 1 H. L. 291.
(3) L. R. 5 H. L. 100.

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expression to describe Lord Portman and his daughter) have not, by any application of the rule against perpetuities, succeeded in displacing the title of the appellants to these heirlooms. It follows that, in my view, on this ground alone, the declaration made by the learned judge in favour of the respondents must fall to the ground.

And here I might leave the case, for I have just given what, in my judgment, is an all-sufficient reason for supporting the appellants' claim to these heirlooms. But as so much of the argument was directed to the further question—the second question above posed, whether the title of the respondents must not also be negatived on the ground that upon the true construction of the testator's will the respondents having ceased to have any interest in the Buxted Park Estate have ceased to have any interest in the heirlooms, I ought, I think, to deal with that question also.

Now here the testator's will is in a very material respect to be distinguished from most, if not all, of the authorities which on one side or the other have been relied on for the purpose of enabling us to determine in this respect the true effect of the referential dispositions of the chattels at Buxted Park contained in it. In these other cases, the estate or house to the enjoyment of which the chattels there in question were, if I may use the expression, attached, or sought to be attached, as heirlooms, was either itself settled by the same instrument or it had been the subject of a settlement which already operative was in that instrument referred to as existing. And it will be found that one at least of the judges favourable to the view ultimately taken in the much discussed case of *Foley* v. *Burnell* (1) regarded that circumstance as the determining factor in the conclusion reached. In the present case, however, the testator when he made his will not only did not know—he did not even, it would appear, correctly guess—what would at the time of his death be the actual position of the Buxted Park Estate to the ownership of which it was his purpose to attach the chattels with which we are now concerned. His will is framed in the

(1) 1 Bro. C. C. 274; 4 Bro. P. C. 319.

primary contemplation, if I may so say, that his wife Lady Catherine Harcourt would survive him. She is appointed one of his executors, and she takes many benefits under it. She did not in the event survive him. If she had done so her position would have been—she states it in her will—that having no issue she would have become entitled on the testator's death to the Buxted Park Estate in fee simple, and it would have resulted that the testator's chattels there would, under his will, have devolved upon her absolutely as the person so entitled. In that event her then existing will, which by reason of her having survived the testator now regulates the situation, would have had no influence at all upon their devolution. For what she would have done, if, having survived the testator, the estate had become her own to dispose of in her lifetime as she would, and on her death as she chose, no one of course can say. But this much is clear from no more than a casual consideration of the circumstances surrounding the testator at the time that he must when he made his will have been in complete uncertainty as to the situation of the Buxted Park Estate at his death. I do not, of course, in saying this forget that Lady Catherine's will, made three years earlier, had been signed also by the testator for a special purpose, nor do I discount the fact that his will, although very obviously the work of another professional hand, was made with at least a general knowledge on the part of its draftsman of the earlier instrument. Even so the terms of his will, to my mind, show that if the intent and effect of his dispositions of these Buxted heirlooms as contained in that will—I adopt for convenience that compendious expression—are to be ascertained with any approach to precision, they must be regarded as dispositions made by a testator who, when he framed them, was necessarily in doubt both as to the persons to take and as to the extent and nature of the interests that, at the time of his death, would be actually taken in Buxted Park to the ownership of which, within permissible limits, he sought to attach them. I must not be taken to press this too far. I do not forget that the testator survived Lady

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Catherine; that accordingly her will with reference to Buxted Park became operative in his lifetime; and that in codicils after her death he confirmed his will. All that, I fully recognize, determined in his lifetime the devolution of Buxted Park for a period extending beyond his own life. But, as I conceive, this fact does not operate so as to make it permissible while it determined its effect to attribute an intent and purpose to the will different as a matter of interpretation from that which would have been attributed to it had the testator died on the day succeeding that on which it was made.

I proceed, therefore, bearing these considerations in mind to ascertain, if I can, the intent and meaning of the gifts of these Buxted heirlooms. And first, I entirely agree with the other members of the Court, that, although variations in phraseology do occur in the three several dispositions of them, the decision as to one must be the decision as to all. It would, in my judgment, savour of pedantry in the circumstances of this case to attribute to that variance in phraseology a difference either in intent or result. Therefore, if I single out the disposition of the third set of the heirlooms for special prominence, I do so only because that disposition, combining as it does in one form of words a gift of chattels at St. Clare with one of chattels at Buxted Park, serves best to illustrate aspects of the case which appear to me to be of real significance. For convenience of reference I set forth the third disposition at length: "I give and bequeath all the household goods furniture books pictures and china which shall be in or about my said mansion house called St. Clare and also in and about my said mansion house called Buxted Park respectively at the time of my decease unto the said William Henry Berkeley Portman and Edward William Harcourt their executors and administrators In trust to permit the said household goods furniture books pictures and china respectively to go and be held so far as the rules of law and equity will permit with the said mansion houses called St. Clare and Buxted Park respectively as heirlooms according to the limitations thereof respectively

which shall be respectively subsisting under this my Will or otherwise howsoever at the time of my decease and to be held and enjoyed accordingly in succession by the several person or persons who shall be respectively entitled for the time being to hold and enjoy the said mansion houses respectively." Now the estate at St. Clare referred to in this clause was devised and settled in an earlier section of the testator's will. That estate was his own property. The Buxted Park Estate, as I have already indicated, was brought into settlement by Lady Catherine. Such is the relevant distinction for present purposes between the two estates. In the St. Clare Estate, Lady Catherine is, by the testator's will, given a life interest. Subject to that interest a strict entail in designated branches of Colonel Harcourt's own family is created by his will. So far therefore as the St. Clare chattels are concerned, the words of gift just quoted have a very definite and clearly ascertainable effect by reference to other dispositive clauses in the testator's own will, any alteration in which, if any were subsequently to be made, rested with the testator and with him alone. But, although the situation of the Buxted Park Estate at the time of his death was then, as I have already shown, alike unknowable, and in a legal sense uncontrollable by the testator, the words of disposition of the chattels at St. Clare and of those at Buxted Park are in this clause identical. And to my mind the true inference to draw from that identity of expression is that in the mind of the testator the words used were sufficiently elastic to carry the chattels in the manner specified by himself, and within the limits of the law whatever might be the actual situation of the Buxted Park Estate when he died. And viewed in the light of the circumstances surrounding him and of the possibilities of the future as he saw them when framing his will, the words used by him clearly to my mind indicate his intention to be not that the heirlooms shall at his death go to this person or to that person as personæ designatæ selected by him for that position or expected by him to occupy it; but that the heirlooms shall at his death go with Buxted Park where

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they then will be part of the equipment or adornment of the house so long as the rules of law and equity will permit, to be enjoyed in, and along with, the house by the persons in succession who, whether known or unknown to him, shall in fact be the persons enjoying that estate in succession after his death. Chattels, like anything else, must have an owner. The designated owner of these chattels is the person to whom belongs for the time being, the house of which they form a part; the enjoyment of the two is to be conjoined so long as the rules of law and equity will allow it. In other words, and here I am paraphrasing the words of Lord Cairns in *Harrington* v. *Harrington* (1), the persons to take are to be ascertained—not with reference to the limitations of the real estate then defined, as in *Christie* v. *Gosling* (2), which is no guide in the present case (3), but by future events—namely, by the fact of their being the person or persons who in succession shall be entitled for the time being to hold and enjoy the Buxted Estate or its mansion house. And this view of these gifts, amply justified as I think it is by the very language in which they are made, is strikingly supported by other provisions of the will.

The testator was, apparently, possessed of a great quantity of live and dead stock, furniture, plate, pictures, articles of vertu and household chattels generally, located at the different houses and properties of which he was possessed or in which he was interested. The method of disposition of these chattels adopted throughout his will, a method practically uniform, was one which resulted in this, that a house or property with its own equipment remained in one hand. The St. Clare heirlooms are dealt with in the clause just cited; and with reference to them the testator gives further effect to this desire of his in the express power given to Lady Catherine to let St. Clare as a *furnished* house for a term of years. So the same desire and intent are manifest in the gift of the live and dead farming stock and furniture of the farms to the first taker at his death of the estates of

(1) L. R. 5 H. L. 87. (2) L. R. 1 H. L. 279.
(3) L. R. 5 H. L. 98.

St. Clare and Buxted Park respectively: in the power given to Lady Catherine to appoint his London house in Carlton Gardens, with all the household goods, furniture, china and effects of every kind there by will or codicil after her own death and in the direction that in default of appointment the whole shall fall into residue as a unum quid. The intent, indeed, in this respect of the gift now in question appears to me to be so clear that I am bold enough to aver that while the testator undoubtedly did realize (his words show it) that the rules of law and equity to which he refers might in time bring about a severance in ownership and enjoyment, he did not contemplate it as even possible that his Buxted heirlooms could under the gift he made of them, directly devolve in possession upon a beneficiary who had not then, never had had, and never could by devolution acquire, any title to, or interest in, Buxted Park. Yet this is the result of the declaration made by the learned judge, deferring as he has done in making it to authority which seemed to him imperious.

The respondent Lord Portman rightly received the chattels in the first instance because on the death of his mother he became defeasible tenant for life of the estate and mansion house. By the learned judge's decree he now retains them for his life although all his interest in the estate and mansion house has ceased. His case is difficult enough; that of the infant respondent is, however, even more difficult to bring within the provisions of the will. She, of whom it may at most be said that she had at her father's succession a doubly defeasible reversionary interest in the estate, is by the same decree to take the chattels absolutely on her father's death although any interest of hers in the estate always defeasible, and never enjoyed, is already entirely defeated; while, most striking of all, her right, remote as it is from any qualification to possess it conferred by the testator's words, is to be displaced by a person even more remote from that qualification; that is to say, by a son, born to her father hereafter—one, who will never and can never have any interest in the estate under any existing

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title at any moment of his life—but who, nevertheless, if he be born, will take the chattels on Lord Portman's death for an absolute interest in possession. Any person more outside the ambit of the testator's words it is difficult to conceive.

Now, of course, I may be mistaken in the intention which I have attributed to the testator, judging of it as I have done. I do not find, however, that the conclusion I have reached and have stated is really challenged anywhere. The learned judge himself intimates that if the question which it raises had not been answered by authority, the language used by the testator might well be construed as negativing the meaning he felt himself compelled to place upon it.

This at once raises the much vexed question of the legitimate use of authority as an aid in the construction of wills, and it is convenient at once to set forth as a useful guide in the present case the latest deliverance on that subject. In the recent case in the House of Lords of *Lucas-Tooth* v. *Lucas-Tooth* (1) in which a similar problem had to be solved by the House of Lords, the Lord Chancellor said: "Indeed, in approaching a problem of this kind it is important never to lose sight of the true principle of construction in such cases—that it is the duty of the Court to discover the meaning of the words used by the testator, and, from them and from such surrounding circumstances as it is permissible in the particular case to take into account to ascertain his intention. For this purpose, it is important to have regard not only to the whole of the clause which is in question, but to the will as a whole which forms the context to the clause. Unless this is done, there is a grave danger that the canons of construction will be applied without due regard to the testator's intention, tending thereby to ascertain his wishes by rules which, in the particular case, may produce consequences contrary to that intention."

I proceed, therefore, to consider the question whether, assuming the true intention of the testator on this subject

(1) [1921] 1 A. C. 594, 601.

as expressed in his will to be what I hold it to be, there is any binding authority which requires the Court to decide contrary to that intent and to give these chattels in succession to a series of persons with no qualification to enjoy them required by the testator. In my opinion, there is none. In view of the words of the Lord Chancellor just quoted any authority to be in the circumstances sufficient would, it would seem, have to be very express. None such, as I think, exists. In the first place I would point out that the authorities on the subject do not for the most part touch the particular question raised by this will. They deal with words of gift by which an indefeasible title to heirlooms may be acquired by a person who has no title in possession to the house to which they are attached, but only a title in remainder. They are not, however, directed to the case we have here where it is contended that the heirlooms vest in persons who have no title at all either present or future to the estate. It is indeed only in a remote sense that the authorities relied on are really in point. Upon the more general aspect of the subject, however, there is a statement of Lord Parker's in *In re Parker* (1) already cited which may be regarded as stating the ultimate effect of them all. If, he says, the words used are to have attributed to them the meaning that title and possession are to go together "the words must be reasonably clear and certain." In my judgment, the words of the testator's will amply satisfy that test.

But if even closer authority for that conclusion is wanted —authority amounting almost to identity of expression in the critical phrase—it is, I think, to be found in the decision of the Court of Appeal in *In re Chesham.* (2) In my judgment, that case is not, in its language, fairly distinguishable from the present. It is not, for instance, I think, permissible, for the purpose of distinguishing it, to alter, as the learned judge has done, the position in the sentence where it occurs in the testator's will of the word "accordingly," and thereby reduce, or alter, the natural effect of that word; while if the word be retained

(1) [1910] 1 Ch. 581, 585. (2) [1909] 2 Ch. 329.

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where it is, then although I agree it is grammatically permissible to read the word in connection with its immediate antecedent " as heirlooms " it is not easy to place a satisfactory meaning upon the resulting phrase " enjoy as heirlooms " ; whereas, if the word is taken, as I think it ought to be taken, as referring to the whole preceding phrase " with the said mansion house called Buxted Park as heirlooms,"—(I take from the first disposition the words dealt with by the learned judge)—the result being that the chattels are to be so enjoyed, then the word not only receives its appropriate significance, but at once the whole expression has an effect identical with the words in *In re Chesham.* (1)

But one need not blink the fact that the real reason why such distinctions have been sought not between this case only, but between any case in hand, and *In re Chesham* (1) is that it is thought, in some most competent and influential quarters, that *In re Chesham* (1) is itself outside the stream of recognized authority, and that the decision ought not to be followed even in a Court bound by it, except in a case where the words in question are identical. An extreme instance of this view will be found in *In re Lewis.* (2) Now I confess I do not myself share it. If I may respectfully say so I do not cavil at the decision in *In re Chesham* (1), properly understood. The principle on which it proceeded, stated as it is by Lord Cozens-Hardy M.R. in his judgment, is not only, I apprehend, unimpeachable, but, in its application to the will there in question, it effectuated the intention. What more can be asked of any decision ? Nor is it quite correct to say, as was argued before us, that *In re Chesham* (1) has never since been judicially referred to except for the purpose of being distinguished. It was, on the contrary, applied and adopted by Peterson J. in *In re Fowler* (3) ; and, without question it has been followed by both the Chancery Division and the Court of Appeal in Ireland in *In re Duckett.* (4)

But it is further said that *In re Chesham* (1) is not really

(1) [1909] 2 Ch. 329.
(2) [1918] 2 Ch. 308.
(3) [1917] 2 Ch. 307.
(4) [1918] 1 I. R. 110.

the case to apply here. The authority really in point is, so it is suggested, *Foley* v. *Burnell* (1), the case which lies at the root of all subsequent authority on this subject. The words in the will in that case were, it is argued, identical with those in the testator's, and there it was held that the words were not sufficiently clear and certain to make possession and title go together.

Now I shall have a word to say about *Foley* v. *Burnell* (1) before I finish. At present I merely observe that there are two grounds which, as it seems to me, clearly distinguish that case from the present. The first is that *Foley* v. *Burnell* (1) was one of those cases to which reference has already been made in this judgment. The house there to which the chattels were attached as heirlooms was itself settled by the same will. This point again meets us, and its importance in *Foley* v. *Burnell* (1) is shown in the following extract from the opinion of Eyre B. in advising the House of Lords (2): "If this were only a devise of the plate to the successive possessors of the house without reference to the title under which they would come into possession of the house, I should think that the absolute property would not vest till some person was actually in possession of the house; but this is not the case; the testator meant to limit the same estate and interest in the furniture and plate as he had before limited in the house. The words have an obvious reference to the former limitations of the real estate, and should receive the same construction as if the limitation of the real estate had been in terms applied to the plate and furniture." The present is the first case referred to by the learned Baron. And the second ground of distinction between *Foley* v. *Burnell* (1) and the present case is this: there were in that case no words of reference to the rules of law and equity; the chattels there were "to be annexed and go along with such houses respectively for ever." In that case the Court was confronted with a perpetuity if the view of the plaintiffs was accepted: "We can only adopt so much of the testator's intent as was legal,"

(1) 1 Bro. C. C. 274. (2) Romilly's N. C. 3.

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said Lord Loughborough. And on this point Lord Eldon in his argument in *Duke of Newcastle* v. *Countess of Lincoln* (1), quoted by Wood V.-C. in *Scarsdale* v. *Curzon* (2), says this: "I do not quote *Foley* v. *Burnell* (3) as deciding what the Court would have done if instead of a perpetuity intended the words 'so far as law and equity will allow' had stood part of the case." Here the words do stand part of the case and the significance of such words where no perpetuity, as here, was intended is again alluded to in *Harrington* v. *Harrington*. (4) These two most material distinctions between the cases appear to me to be ample justification for the view I hold, that *Foley* v. *Burnell* (3)—in its details—I emphasize these words—is an authority which cannot govern the present. But the truly remarkable thing about *Foley* v. *Burnell* (3) when it is fully considered is that, in its details, it should be an authority governing any case not precisely similar. It was said of it in 1859 in the argument in *Scarsdale* v. *Curzon* (2): "*Foley* v. *Burnell* (3) will not be followed where there is a clear restriction to persons coming into possession. Always disapproved, it is binding only where the same words occur." And that I should have thought was the attitude from which *Foley* v. *Burnell* (3) in its details might well have continued to be regarded.

It is, of course, quite clear that conveyancing convenience, and, if you will, normal family requirements in connection with the periodic resettlements of entailed estates, make it most desirable that the remainderman's title to hitherto settled heirlooms and leaseholds should be at the moment of resettlement such that, although not in his then possession, they may with the settled realty be validly included in the resettlement. Accordingly the rule of which *Foley* v. *Burnell* (3) is the foundation deserves all support—namely, that in a case where gifts of chattels are made to follow settled real estates as heirlooms doubtful words tending to restrict the interest in the chattels to those who come into possession of the estates will not have the effect of suspending the interest

(1) (1798) 3 Ves. 387.
(2) 1 J. & H. 45, 62.
(3) 1 Bro. C. C. 274.
(4) L. R. 3 Ch. 564; L. R. 5 H. L. 87.

until the time when possession of the realty is obtained. The necessary words to effectuate that result must be reasonably clear and certain; I again repeat Lord Parker's phrase. But to go on from that and claim for the actual words found in *Foley* v. *Burnell* (1) a kind of verbal inspiration so that these words are to be regarded as words which never, and in no place, are reasonably clear and certain, is indeed a great step. Of the words themselves Willes J., in advising the House of Lords in *Foley* v. *Burnell* (1), said this: "The question is who is entitled to take under the description in this will of the several persons who from time to time shall respectively and successively be entitled to the use and possession of his house. And it appears to me that no words in the language could express more plainly than these do the testator's intention, that no person should have the plate till he was tenant in tail in possession of the house." And the view taken by three out of the five judges consulted was that in that case, in the face of the words of the will to make the chattels vest in a child who although entitled in remainder never was in possession of the house, was a construction directly contrary to the express words of disposition. This view did not prevail with the House of Lords under Lord Thurlow, but if one asks why it did not, the answer, I think, is not that the justice of Willes J.'s interpretation was denied, although Lord Thurlow evidently thought his words too emphatic, but because the House finally accepted the view expressed in the following reported portion of the argument of Lord Eldon when counsel before it: "The plaintiffs could not determine whether the testator intended that no son should be entitled to the heirlooms in question until he attained 21 or till he was entitled to the possession of the estate to which they were annexed; he might have intended either; both intentions are implied; neither are expressed; you must have clear unambiguous words." (2) The consequence of which, in the words of Lord Loughborough (3), was: "It is clear that the

(1) Romilly's N. C. 6. (2) 4 Bro. P. C. 327.
(3) 1 Bro. C. C. 275.

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testator meant to annex the chattels to the real estate as heirlooms; all beyond that is inference. The intent is not clear; an implied intent must be free from doubt." In effect, therefore, the decision in *Foley* v. *Burnell* (1) was reached without reference to the words now in question at all; first, for the reason just given by Lord Loughborough; and secondly because, if they had been relied on, the Court, as already stated, would have been confronted with a perpetuity.

In these circumstances I cannot myself believe that *Foley* v. *Burnell* (1) can ever be vouched as a direct authority in a case where the words used, being capable of having the effect which is attributed to them by Willes J., are found in a context and setting which justifies and instructs a court of construction to give them that full effect. And that, in my judgment, is the case here. Any other view of his words would, I think, in this case entirely defeat the testator's expressed intention.

In my judgment, therefore, the claim of the respondents to these chattels is displaced no less by the strength of the appellants' title than by the weakness of their own. Whether, however, the views I have ventured to express on the latter subject are accepted or not, enough has, I think, been shown to demonstrate that in the absence of the residuary legatees of the testator, between whom and the respondents this question really arises, no positive declaration in favour of the respondents with reference to these heirlooms should now be made. A title in them may in these proceedings as constituted be negatived; it ought not, in my judgment, to be affirmed. In my judgment, the proper declaration for this Court now to make is one negativing any interest in these heirlooms in the respondents or either of them.

Appeal dismissed.

Solicitors: *Rawle, Johnstone & Co.; Greenfield & Cracknall.*

(1) 1 Bro. C. C. 274; 4 Bro. P. C. 319.

G. A. S.

Distinguished. *Re* BARNATO (*decd.*). [1949] 1 All E.R. 515.

Distinguished. *Re* BARNATO. [1949] 1 Ch. 258

In re CHAMBERLAIN'S SETTLEMENT.

CHAMBERLAIN *v.* CHAMBERLAIN.

P. O. LAWRENCE J.

1921

July 21, 22, 28.

[1921. C. 183.]

Settlement—War Legislation—Tenant for Life—Income of Trust Fund—"Until some event shall happen whereby the said income if belonging absolutely to him would become vested or charged in some other person or persons or corporation"—Forfeiture—German National—Treaty of Peace with Germany, art. 297 (e)*—Treaty of Peace Order,* 1919, *s.* 1, *clause* (*xvi.*), *s.* 2*—Charge—Originating Summons—Attorney-General made Party.*

By a settlement dated in 1902 a fund of 5000*l.* was vested in trustees on trust to invest and pay the income of the trust funds to H. S. C. during his life or until he should become bankrupt or charge it, "or until some event shall happen . . . . whereby the said income or any part thereof if belonging absolutely to him would become vested or charged in favour of some other person or persons or corporation" and in the event of the determination during the life of H. S. C. of the above trust in his favour the trustees were given a discretion to apply the income for the benefit of all or any the said H. S. C. and his present or any other after-taken wife and his issue and the persons interested for the time being under the ulterior trusts, and, subject thereto, were directed to hold the capital and income of the trust funds upon trust for the benefit of the issue of H. S. C. and in default of issue upon trust for H. S. C.'s nephews and nieces. H. S. C. was born in England of English parents but had resided in Germany since 1906 and had been twice married there to German wives. During the war—namely, on August 8, 1916—he obtained a certificate of naturalization as a German. In these circumstances a summons was taken out by the trustees to have it determined whether the life interest of H. S. C. in the funds was forfeited by virtue of the charge imposed on property of German nationals in this country on January 10, 1920, by virtue of art. 297 of the Treaty of Peace with Germany or the Treaty of Peace Order, 1919, and how the income accrued since August 4, 1914, ought to be disposed of. It was admitted at the hearing on behalf of H. S. C. that in a German Court applying German law he would be recognized as a German citizen. No question arose as to the income before November 4, 1915, which had been paid over to H. S. C.'s agent:—

Held (following the decision of Russell J. in *Stoeck* v. *Public Trustee*, ante, p. 67), that the question whether a person was a "German national" within the meaning of the Treaty and Order fell to be determined exclusively by German municipal law and accordingly that H. S. C. was a German national within the meaning of the Treaty and Order.

Held, therefore, that H. S. C.'s interest under the settlement was forfeited as on January 10, 1920, and that subject to the payment of costs the accumulations of income in the trustees' hands from November 4, 1915, to January 10, 1920, must be paid to the custodian.

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Held, also, that as the question raised was one that might affect a large section of the British public, the Attorney-General was a proper party to the proceedings.

ADJOURNED SUMMONS.

By an indenture of settlement dated May 5, 1902, Sir Crawford Trotter Chamberlain who had vested in the plaintiffs the sum of 5000*l.* directed them (clause 1) to hold the said sum upon trust to pay thereout all costs charges and expenses as therein mentioned and to invest the balance of such sum as therein mentioned and to stand possessed of the said balance and the investments for the time being representing the same (thereinafter called "the trust funds") and the income thereof upon the trusts and with and subject to the powers and provisions thereinafter contained concerning the same. By clause 2 it was provided that the trustees or trustee should pay the income of the trust funds to the defendant Houston Stewart Chamberlain during his life or until he should become bankrupt or should assign or charge or affect to assign or charge the said income or some part thereof or until some other event should happen (other than a consent to any exercise of the power of advancement thereinafter contained) whereby the said income or any part thereof if belonging absolutely to him would become vested in or charged in favour of some other person or persons or a corporation And in the event of the determination during the life of the defendant H. S. Chamberlain of the trust thereinbefore contained of the said income in his favour should during the remainder of his life pay or apply all or any part of the said income unto or for the personal support and benefit of all or any one or more exclusively of the others or other of the following persons namely the defendant H. S. Chamberlain and his then present or any after taken wife and his issue if any for the time being in existence and the person or persons for the time being interested in the trust funds under the trusts thereinafter declared in such shares and in such manner as the trustees or trustee should from time to time in their or his absolute discretion think proper. And subject to such discretionary trusts should

during the remainder of the life of the defendant H. S. Chamberlain hold the said income or so much thereof as should not be applied under such discretionary trusts upon the trusts and for the purposes upon and for which the said income would for the time being be held under the said indenture if the defendant H. S. Chamberlain were then dead. By clauses 3 and 4 it was provided that after the death of the defendant H. S. Chamberlain the trustees or trustee should stand possessed of the trust funds and future income thereof upon trust for his children or remoter issue as therein mentioned. Clause 7 provided that if there should be no child of the defendant H. S. C. who being a son should attain the age of twenty-one years or being a daughter should attain that age or marry then subject and without prejudice to the trusts powers and provisions thereinbefore declared and contained and to the persons by law vested in the trustees or trustee and to every exercise of such respective powers the trustees or trustee should stand possessed of the trust funds and the income thereof or so much thereof as should not then have become vested or been applied under any of the trusts powers and provisions thereinbefore contained or the said statutory powers in trust for all or any of the children or child of the plaintiff Henry Chamberlain who being a son or sons should attain the age of twenty-one years or being a daughter or daughters attain that age or marry under that age if more than one as tenants in common in equal shares.

During the war—namely, on August 8, 1916—the defendant H. S. Chamberlain obtained a certificate of naturalization as a German.

In these circumstances, the trustees of the settlement, on January 12, 1921, took out the present originating summons asking (inter alia) (1.) that it might be determined whether the trust declared by clause 2 of the settlement for the payment of the income of the trust funds to the defendant H. S. Chamberlain during his life had ceased by virtue of the Treaty of Peace Act, 1919, or of the Orders in Council made thereunder or otherwise, and, if so, from what date; and (2.) that directions might be given as to how the

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income of the trust funds received since August 4, 1914, and the accumulations of such income ought to be disposed of or dealt with.

The following facts were alleged in the affidavit filed on behalf of the trustees.

The defendant H. S. Chamberlain was the youngest son of Admiral William Charles Chamberlain (brother of Sir Crawford Trotter Chamberlain) and was born in England on September 9, 1855. In the year 1869 he went for a short time to Cheltenham College leaving there in the following year to go to the Riviera for the sake of his health and he studied there until 1878 under a Prussian tutor named Kuntze. In the spring of 1878 he was married at the British Consulate at Geneva to Anna Horst a German teacher of music and from that time until about 1882 he lived in Geneva and Paris and from 1882 till about 1906 in Vienna. In or about the year 1907 he divorced his wife in Germany and in or about December, 1908, he married the defendant Eva Chamberlain who was a daughter of the composer Richard Wagner and had ever since lived with his wife in the home of Frau Wagner at Bayreuth in Bavaria. He had had no issue by either marriage.

The defendant H. S. Chamberlain was before the war very well known in Germany from his writings on political and other subjects in which he expressed strong pro-Teutonic and anti-Semitic opinions. During the war his views were anti-British.

In February, 1921, the trustees received a letter dated February 7, 1921, from Messrs. Farrer & Co., the solicitors of the defendant H. S. Chamberlain, in which they stated that they had received a letter from him informing them that he had received his certificate of naturalization as a German bearing date August 5, 1916, and adding "that his application for naturalization was originally made the very day the news reached us of England's declaration of war against Germany which forced me to decide once for all between the country of my birth and the country of my adoption, which is also the country of my affections since childhood

and the country which gives me my livelihood. But it is a long business to obtain naturalization in Germany, as each separate state must in turn give its consent so that the documents go wandering from one end of Germany to the other. Besides which, special permission for naturalization during a war has to be obtained from the Chancellor. Hence the delay."

The defendant H. S. Chamberlain filed no evidence but rested his defence solely on his contention that by virtue of his birth in England he was a British subject and that his German nationality was void in English law as having taken place during the war.

On May 25, 1921, the summons came on for hearing and was part heard, but the defendant H. S. Chamberlain's defence being then disclosed by his counsel the trustees' counsel asked for an adjournment to add the Attorney-General as a defendant, to which the defendant H. S. Chamberlain objected.

On June 23, 1921, the judge directed that the Attorney-General should be added as a defendant without prejudice to the defendant H. S. Chamberlain's contention that the Attorney-General was not a proper party.

By the Treaty of Peace, 1919, art. 297: "The question of private property, rights and interests in an enemy country shall be settled according to the principles laid down in this section and to the provisions of the Annex hereto. . . . . (*e*) The nationals of Allied and Associated Powers shall be entitled to compensation in respect of damage or injury inflicted upon their property, rights, or interests, including any company or association in which they are interested, in German territory as it existed on August 1, 1914, by the application either of the exceptional war measures or measures of transfer mentioned in paragraphs 1 and 3 of the Annex hereto. The claims made in this respect by such nationals shall be investigated and the total of the compensation shall be determined by the Mixed Arbitral Tribunal provided for in Section VI. or by an arbitrator appointed by that Tribunal. This compensation shall be borne by Germany,

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and may be charged upon the property of German nationals within the territory or under the control of the claimant's State. This property may be constituted as a pledge for enemy liabilities under the conditions fixed by paragraph 4 of the Annex hereto. The payment of this compensation may be made by the Allied or Associated State, and the amount will be debited to Germany."

By the Treaty of Peace Order, 1919, s. 1, clause (xvi.) "All property, rights and interests within His Majesty's Dominions or Protectorates belonging to German nationals at the date when the Treaty comes into force (not being property rights or interests acquired under any general licence issued by or on behalf of His Majesty), and the net proceeds of their sale, liquidation or other dealings therewith, are hereby charged—

(*a*) in the first place, with payment of the amounts due in respect of the claims by British nationals with regard to their property, rights and interests, including companies and associations in which they are interested in German territory, or debts owing to them by German nationals, and with payment of any compensation awarded by the Mixed Arbitral Tribunal, or by an arbitrator appointed by that Tribunal in pursuance of paragraph (*e*) of Article 297 and with payment of claims growing out of acts committed by the German Government or by German authorities since the thirty-first day of July, and before the fourth day of August, nineteen hundred and fourteen; and

(*b*) secondly, with payment of the amounts due in respect of claims of British nationals with regard to their property, rights and interests in the territories of Austria-Hungary, Bulgaria and Turkey, in so far as those claims are not otherwise satisfied.

Provided that any particular property, rights or interests so charged may at any time, if His Majesty thinks fit, be released from the charge so created."

By s. 2: "For the purposes of this Order— . . . . The

expression 'nationals' in relation to any State includes the subjects or citizens of that State and any company or corporation incorporated therein according to the law of that State and in the case of a Protectorate the natives thereof. . . . ."

An opinion of Dr. Ernest J. Schuster, taken on behalf of the trustees, was accepted by all parties as correctly stating the German law on the subject. The material part of this opinion was as follows: "In the German official text of the Treaty of Peace the expression 'German national' is translated by the words 'Deutscher Reichsangehöriger' (see for instance Art. 297). According to the German Nationality Statute of 1913 (which came into force on January 1, 1914, and was in force at the date of the said defendant's naturalization) a person naturalized in Germany in the manner shown by the letter of Messrs. Farrer & Co. dated Feb. 7, 1921, by virtue of such naturalization acquires the status of 'Reichsangehöriger' and therefore becomes a 'German national' within the said meaning. There are no different classes of German subjects or citizens. They are all 'Reichsangehörige' whether naturalized or German born. . . . . The fact that at the date of the application, and up to the date of the grant of the certificate, the defendant was the subject of a State at war with the German Empire did not in any way according to German law, weaken the effect of the naturalization or prevent the said defendant from acquiring the status of a 'German national' for all purposes whatsoever."

Vaisey for the trustees of the settlement.

Owen Thompson K.C. and *Roope Reeve* for persons entitled under the settlement in default of issue. We do not raise any question as to the income up to November 4, 1915, which was paid to and still stands at the defendant H. S. Chamberlain's account at his bank. It is admitted that Dr. Schuster's opinion correctly states the German law as a German Court applying German law would hold it to be. It follows that within the German Peace Treaty and the Order the

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defendant H. S. Chamberlain is a German national, and that his life interest became forfeited on January 10, 1920, by virtue of the charge created by the Treaty and Order: see Treaty of Peace Order, 1919, s. 1, (i.), (ii.), (x.), (xvi.), (xvii.), ss. 2, 4; Treaty of Peace, art. 297, (*b*), (*c*), (*e*), (*k*), (*i*), Annex 4. *Stoeck* v. *Public Trustee* (1) is a clear decision that for the purpose of determining whether or not a person is a German national within the Peace Treaty resort must be had solely to the question whether or not the German Court would hold him to be such.

The accrued income from November 4, 1915, up to the date of forfeiture has vested in the custodian under the Treaty of Peace charge: *In re Levinstein.* (2)

Jenkins K.C. and *F. E. Farrer* for the defendant H. S. Chamberlain and his wife. The Attorney-General is not a proper party to these proceedings and he ought not to be heard. He ought only to be made a party (i.) when the Crown has a proprietary right which is involved; or (ii.) when the proceedings, if successful, will affect rights claimed by the Crown: *Esquimalt and Nanaimo Ry. Co.* v. *Wilson* (3); or (iii.) where a claim is made against a servant of the Crown in respect of an act done in that character; or (iv.) when matters of interest to the general public are in question, as in cases relating to highways or markets.

The charge under the Treaty of Peace is for the benefit of a limited class of persons and not of the general public: see Treaty of Peace Order, 1919, s. 1, (xvi.), (xvii.). These rights are properly defended by the custodian who may be a necessary party.

[P. O. Lawrence J. The matters in question here affect the entire public, or at any rate, those who are taxpayers, and I will hear the Attorney-General.]

At common law no British natural-born subject could divest himself of his nationality; nor had the King power to license him to divest himself: Cockburn on Nationality, pp. 63, 198; he could be divested only by Act of Parliament.

(1) Ante, pp. 67, 82. (2) Ante, p. 251.
(3) [1920] A. C. 358.

So strong was the rule that an abjured person to whom it was death to come back to this country without the King's leave did not lose his English allegiance; he lost his fatherland, but not the father of his fatherland: *Calvin's Case.* (1) No education or residence abroad from early infancy, no state service under a foreign monarch, could divest him of his English nationality: *Æneas Macdonald's Case.* (2) The Naturalization Act, 1870, replaced by the British Nationality and Status of Aliens Act, 1914, does not allow a British subject in time of war to divest his nationality for that of the enemy: *Rex* v. *Lynch* (3); *Ex parte Freyberger.* (4)

The defendant H. S. Chamberlain's purported naturalization was in British law wholly void. He is and always has been a British subject.

But it is put against him that for the exceptional purposes of the Peace Treaty, a British Court must hold him to be a German national, as a necessary consequence of the German Court holding him to be so. The onus of establishing such a proposition lies on those that allege it. In fact what is suggested is that the British Court is to abdicate in favour of the German Court.

Stoeck v. *Public Trustee* (5) is no authority for such a proposition. There the only question was whether a German subject by origin had lost his original nationality, and become "sans patrie." In that case there was no conflict, as here, of nationality and law. An English Court cannot possibly know the general German law as to nationality, nor can the German text of the Peace Treaty, on which the German Courts proceed, be read in an English Court: expressedly the only texts that are authentic are the English and French. Suppose the German law were to apply the same principles as did before 1870 the old English common law, then if a German born subject comes to England, lives here, and is formally naturalized as an Englishman here,

(1) (1608) 7 Rep. 9*a*.
(2) (1749) Foster C. C. 59.
(3) [1903] 1 K. B. 444.
(4) [1917] 2 K. B. 129.
(5) Ante, p. 67.

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his property here, on the contention put forward by the opponents, will be taken by the Peace Treaty as being that of a German national.

Again there is good ground for believing that a number of English women caught by the outbreak of the war in Germany and there retained were intimidated into taking up certificates of naturalization as Germans. If they did this for fear of their lives, and at the earliest reasonable opportunity returned to British allegiance, it has been the law from the time of the Plantagenet, that an indictment of them for high treason would fail. Yet if the contention of the opponents is law these guiltless women would lose their property under the Peace Treaty.

It is one thing to say that a person cannot be a German national within the Peace Treaty unless the German Court would hold him such; quite another to say that every one whom the German Court would say was a German national must as a necessary consequence be held to be so by a British Court.

The onus lies on our opponents; they do not discharge it; quite the contrary: see the provision that the English text is to be authentic, and that the liquidation is to be carried out in accord with English law, and the price and compensation ascertained in accordance with English methods: art. 297 (*b*), (*c*).

Gavin T. Simonds (*Sir Gordon Hewart A.-G.* with him) for the Attorney-General.

[P. O. LAWRENCE J. Do you prefer to appear on behalf of the custodian or on behalf of the Attorney-General?]

As the question is one of public interest—namely, whether the property is the subject of the charge, and may affect other cases—I desire to appear on behalf of the Attorney-General. The only claim the Attorney-General makes is that the accumulations of income up to January 10, 1920, are subject to the charge. To show this it is necessary to prove that on January 10, 1920, the defendant H. S. Chamberlain was a German national. It is submitted that a person may be a German national for the purposes of the Peace Treaty,

although he may also be the subject of another State. The Court has to decide what on the construction of the Peace Treaty is the meaning of the expression "German national." Under that Treaty nationality is made the test of a person's fortunes. At the date of the Treaty dual nationality was of constant occurrence, as must be the case where one country adopts the jus soli and another the jus sanguinis. The test is, is the person in question of German nationality according to German municipal law? If he is, then his property is subject to the charge. Here according to German municipal law the defendant H. S. Chamberlain is a German national for the purposes of the Treaty. The conflict only arises because each country claims the same person as its own subject. If the defendant H. S. Chamberlain were standing his trial here for high treason he would be taken to be a British national. I do not quarrel with the statement as to what is the common law on this point. There is power to release any property subject to the charge from the charge. It is submitted therefore that the defendant H. S. Chamberlain must be treated as a German national, both because he is resident in Germany and because his change of nationality has been brought about by his own act.

Cur. adv. vult.

July 28. P. O. LAWRENCE J. read the following judgment: This summons raises the question whether the respondent, Houston Stewart Chamberlain (hereinafter called the respondent), is a German national within the meaning of the Treaty of Peace (hereinafter called the Treaty), and of the Treaty of Peace Order, 1919 (hereinafter called the Order).

The respondent was born in England on September 9, 1855; he therefore was a natural-born British subject. He was twice married, first to a German teacher of music, whom he divorced in Germany in 1907, and secondly to a daughter of the celebrated German composer, Richard Wagner. Since the year 1908 he has resided with his wife at the house of his mother-in-law at Bayreuth, in Bavaria. His views were

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anti-British, and during the war (namely, on August 8, 1916) he voluntarily became naturalized in Germany.

Sect. 2 of the Order provides that for the purposes of the Order the expression "nationals" in relation to any State includes the subjects or citizens of that State.

I agree with the decision of Russell J. in *Stoeck* v. *Public Trustee* (1), that the question whether a person is a "German national" within the meaning of the Treaty and Order falls to be determined exclusively by the German municipal law.

In the present case all the parties have accepted the opinion of Dr. Ernest J. Schuster as correctly stating the German law on the subject, and I have accordingly based my findings as to German law upon that opinion.

According to German municipal law the respondent, by virtue of his naturalization, acquired the status of a German subject, although at the time he was the subject of a State at war with the German Empire. Further, in the German official text of the Treaty the word "national" is translated into "Reichsangehöriger," and by the express provisions of the German Nationality Act, 1913, the respondent on naturalization acquired the status of a "Reichsangehöriger," in other words he became a German national.

It is, however, contended by Mr. Jenkins that as the Courts of this country would in the circumstances of this case refuse to recognize the respondent's change of allegiance, and would hold him still to be, and liable to all the obligations of, a British subject (see *Rex* v. *Lynch* (2), and *Ex parte Freyberger* (3)), therefore this Court ought to hold that he is not a "German national" within the meaning of the Treaty and Order.

Although I agree with the premise upon which this contention is founded, I am of opinion that the conclusion attempted to be drawn therefrom is incorrect.

The respondent, by becoming a German subject in time of war, no doubt committed a crime against the laws of this

(1) Ante, p. 67. (2) [1903] 1 K. B. 444.
(3) [1917] 2 K. B. 129.

country. His act was an offence for which, if he were to come within the jurisdiction and power of this country, he would be liable to our law, and in respect of which his naturalization in Germany would afford no defence.

But whatever decision might be reached by the Courts of this country would not alter the fact that according to German law he did become a German subject. No Court of this country could on the evidence before me properly hold that according to German law the respondent did not in fact become a German subject.

German law does not recognize different classes of subjects or citizens. According to that law the naturalization in Germany of the respondent constituted him a German subject as fully as if he had been a German by birth, notwithstanding that, according to our law, he could not, in time of war, throw off his allegiance to Great Britain and become the subject of an enemy State, and notwithstanding, therefore, that according to our law he still remains a British subject. If, however, I am right in holding that the question whether a given person is a German national within the meaning of the Treaty and Order must be decided exclusively according to German law—and it is on the correctness of this view that my judgment is based—it follows that the respondent is a German national for the purposes of the Treaty and Order, although the Courts of this country would for all other purposes treat his naturalization in Germany as illegal and void.

Bearing in mind that the Treaty is an international agreement, one of the parties to which is Germany, I do not think that there is anything incongruous in holding that the respondent is a German national within the meaning and for the purposes of the Treaty, although for all other purposes the Courts of this country would refuse to recognize his German nationality. To hold otherwise would, in my opinion, lead to the anomalous result that the expression "German national" in the Treaty would bear a different meaning in England from that which it bears in Germany.

The further point, however, has been raised that a German national who has a dual nationality ought not to be held to

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be a German national for the purposes of the Treaty and the Order.

In the case of a German national who is also a national of some power other than one of the Allied or Associated Powers, I see no reason whatever for suggesting that on the construction of the Treaty and Order he ought not to be held to be a German national for all the purposes of the Treaty and Order. It would, indeed, be strange if a German national could escape the burdens cast upon him by the Treaty merely because he also happened to be a national of some State other than one of the Allied or Associated States. In the case of a German national who is also a national of one of the Allied or Associated Powers, and especially where he is a British national and his property sought to be affected is in England, the case is not so clear. I can conceive that in such circumstances cases of difficulty might arise, but on the whole I have come to the conclusion that in construing the Treaty and Order no logical distinction can be drawn between German nationals who are also nationals of a non-allied or non-associated Power, and German nationals who are also nationals of an Allied or Associated Power. In neither case could these persons in my opinion avoid the burdens cast upon them by the Treaty merely by proving that they had a dual nationality; I find it difficult to appreciate how proof of that fact would afford an answer to claims made against them under the Treaty as German nationals. It is further argued that the construction which I have placed on the expression "German nationals" cannot be the true construction, because if it were it would result in great hardship being inflicted upon a number of natural-born and naturalized British subjects who also happened to be German nationals according to German law. The answer to this argument, in my opinion, is that no such hardship would necessarily result, because the custodian (acting under the general direction of the Board of Trade) has power to release the property of a German national from the charge created by the Order (see s. 2 of the Treaty of Peace (Amendment) Order, 1920), and this power would no doubt be exercised in all proper

cases, for example, in such a case as was suggested during the argument where a British national who was also a German national had fought in the war on the side of Great Britain.

The existence of dual nationality must have been well known to all the high contracting Powers, and in my opinion it is not to be supposed in the absence of express words to that effect that it was intended to exempt from the operation of the Treaty all persons who might happen to have a dual nationality. I think that the true view of the construction of the Treaty is that the expression "German nationals" includes, and was intended to include, all persons who according to German law answer that description, whether they also had any other nationality or not, and that it was left to each of the Allied and Associated Powers so to regulate matters within its own jurisdiction as to ensure that there should be no injustice or hardship.

In my judgment, therefore, all that has to be proved in a case like the present is that the person concerned is a German national according to German municipal law. If that fact be proved then the person concerned comes within the operation of the Treaty and Order, although he may also be a national of some other State, even though that State be Great Britain and even though according to our law, he would be deemed not to be a German subject.

I therefore hold that the respondent is a German national within the meaning of the Treaty and Order.

The effect of this decision, in my judgment, is that the accumulations in the hands of the trustees representing income which has accrued prior to January 10, 1920, ought to be paid to the custodian and that the income accrued and to accrue on and subsequently to that date is applicable under the discretionary trust which came into operation on that date by virtue of the charge created by the joint operation of the Treaty and Order.

In arriving at this conclusion as to the destination of the past and future income of the trust fund, I have followed the decision of Eve J. in *In re Levinstein* (1), with which I

(1) Ante, p. 251.

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agree and which, in my opinion, covers this case so far as this point is concerned.

In conclusion I desire to say a few words about the objection taken by Mr. Jenkins to the presence of the Attorney-General as a party to these proceedings. When the summons first came before me and I realized that it involved the determination of an important question on the construction of the Treaty and Order, I suggested to the applicants that it might be desirable to add the Attorney-General as a party. This suggestion was welcomed by the applicants and by the respondents, other than the respondent Houston Stewart Chamberlain, and the summons thereupon stood over and was amended by making the Attorney-General a respondent. The Attorney-General has raised no objection to having been made a party ; on the contrary he has appeared at the hearing and has assisted the Court by submitting the views of the Crown on the question which has arisen. In my opinion the Attorney-General is a proper party to these proceedings, because the question arising for decision is one which has an important bearing on the carrying into effect of the Treaty of Peace, and, therefore, one which directly concerns the Crown ; moreover, I think it is also a question which may affect a large section of the British public. If authority be needed for joining the Attorney-General as a party under such circumstances I think that it is to be found in the decision of the Privy Council in *Esquimalt and Nanaimo Ry. Co.* v. *Wilson.* (1) There will be a declaration in accordance with my judgment.

Solicitors for plaintiffs and persons entitled under the gift over in default of issue : *Wordsworth, Porter & Shaw, for H. Seymour Chamberlain, Bognor.*

Solicitors for defendant H. S. Chamberlain : *Farrer & Co.*

Solicitor for Attorney-General : *Treasury Solicitor.*

(1) [1920] A. C. 358.

W. I. C.

GRAY *v.* SPYER.

[1921. G. 248.]

YOUNGER L.J. for ASTBURY J.

1921

July 26, 27, 29.

Landlord and Tenant—Tenancy from Year to Year—Right to perpetual Renewal —Repugnancy—Claim for Declaration without consequential Relief.

A perpetual right of renewal is repugnant to a strict tenancy from year to year, and if on construction a lease in fact creates such a tenancy the right of renewal must be rejected.

A claim for a declaration not followed by any claim for consequential relief is as a rule useless and should be discouraged.

For example, a landlord who claims that a tenancy was terminated by notice to quit ought to ask for possession.

Similarly a tenant who relies on a lease void at law for want of a seal ought to ask for specific performance.

ACTION.

By an agreement in writing dated March 23, 1917, and made between Mary Styles, thereinafter called the landlord of the one part and the defendant thereinafter called the tenant of the other part, the landlord agreed to let and the tenant to take the suites of apartments on the second and third floors of 129 Mount Street for one year from March 25, 1917, with the option to the tenant to continue as thereinafter defined at the yearly rent of 350*l.* The tenant agreed (inter alia) to repair, and during the three months previous to the determination of the said term to show the rooms to any person with the object of reletting. He also agreed not to assign or underlet the premises without the landlord's consent, and not to underlet them to females.

The landlord agreed (inter alia) to pay the ground rent, rates, taxes, etc., and to keep the outside walls and roofs in repair. It was further provided that "the tenant shall have the same right to continue on the same terms as a tenant of the demised premises for a further period of 2 years calculated from March 25, 1918, but the tenant shall give 2 months' notice to the landlord as to whether he will continue the tenancy or not." It was also declared that where the context allowed the expressions "the landlord and the tenant" should include their respective executors, administrators and assigns.

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The ground lease under which the landlord held was for a 90 years' term, expiring on September 29, 1975.

On January 4, 1918, the defendant wrote to the landlord drawing attention to the expiration of his tenancy on March 25 and to his option to continue it for a further 2 years and adding: "I do not care to bind myself for a further definite period of 2 years and I shall be glad to know whether you will be agreeable to my continuing for another year from March 25, 1918, with the option to continue for a further year from March 25, 1919, upon the same terms upon giving you notice 2 months before March 25, 1919."

On January 9, 1918, the landlord replied: "I shall be pleased to accept your terms for 1 year certain from March 25 and the option to continue upon the same terms as before."

On January 10, 1918, the defendant wrote saying (inter alia): "I also note that you agree to my revised terms of tenancy regarding the option."

On January 17, 1919, the defendant wrote pointing out that he had an option to renew for a further year from March 25, 1919, and adding: "I should be disposed to exercise that option if you will now give me an option to continue after March 25, 1920, from year to year on the same terms provided that each year before March 25 I give you 1 month's notice of my intention to continue."

On January 18, 1919, the landlord replied: "I shall be pleased to accept your offer to continue till March, 1920, and after that from year to year if you will give me 1 month's notice to continue on the same terms, but if you think of leaving and could make it convenient I should be glad if you could give me 2 months' notice."

On January 20, 1919, the defendant replied: "I am in receipt of and thank you for yours of the 18th instant accepting the new arrangement. I will certainly arrange to give you 2 months' notice if I am intending to leave. I will have a short memorandum prepared for endorsement on the existing lease and forward to you for signature. P.S.—Since writing the above I have prepared the memorandum and enclose agreement herewith."

The indorsed memorandum, which was signed on January 23, 1919, was as follows: "Whereas the tenant in consideration of the landlord giving him an option to continue the tenancy for one year from March 25, 1919, to March 25, 1920, duly gave notice to continue his tenancy until March 25, 1919. And whereas the tenant has intimated to the landlord that he is prepared to continue his tenancy for a further year on the same terms as are contained in the above agreement from March 25, 1919, to March 25, 1920, if the landlord will agree to give him an option to continue the tenancy after March 25, 1920, from year to year on the same terms as are contained in the above written agreement provided that each year before March 25 the tenant gives one month's notice of his intention to continue his tenancy. And whereas the landlord has agreed to give the tenant such option subject to the tenant agreeing that in the event of his not intending to exercise the option and leave the premises on any 25th day of March he will give at least two months' notice thereof. Now it is hereby agreed as follows:—

"1. The tenant hereby exercises the option granted to him by the landlord to continue the tenancy created by the above agreement on the terms contained in such agreement until March 25, 1920.

"2. For the consideration aforesaid and in pursuance of the agreement herein recited the landlord hereby grants the tenant the option to continue the tenancy after March 25, 1920, from year to year on the same terms as are contained in the above written agreement provided that in each year before March 25 the tenant gives one month's notice in writing of his intention to continue the tenancy and that in the event that the tenant desires to leave the premises and put an end to the above agreement on any 25th day of March in any year he will give two months' notice of that his intention."

On June 22, 1920, the landlord informed the defendant that she had sold the ground lease to the plaintiff from Midsummer, 1920.

On June 26, 1920, she wrote to the plaintiff enclosing the defendant's letters as to the renewal of his lease and adding:

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"I did not keep a copy of my answers as I thought it was only from year to year."

On August 26, 1920, the landlord assigned the ground lease to the plaintiff. The assignment did not mention the agreement or memorandum.

On September 21, 1920, the plaintiff gave the defendant notice to quit on March 25, 1921.

On September 24, 1920, the defendant replied calling attention to his "option to continue my tenancy after March 25, 1920, from year to year subject to my giving in each year before March 25 one month's notice of my intention to continue my tenancy" and adding "I gave notice last February to continue my tenancy and it is my intention this February to give a similar notice of continuation."

On January 6, 1921, the defendant gave formal notice that he intended to continue his tenancy "for a further year" from March 25, 1921, and accordingly exercised his option to that effect given in the memorandum.

On February 17, 1921, he gave another formal notice that he intended to continue his tenancy "on the terms referred to in the" memorandum and accordingly exercised his option to that effect given in the memorandum.

On January 24, 1921, the plaintiff commenced this action for (1.) a declaration that upon the true construction of the indorsed memorandum the defendant was not entitled to a perpetual renewal of his tenancy, (2.) in the alternative rectification in accordance with the landlord's letter of January 18, 1919, so as to provide an option for one renewal on a yearly tenancy, and (3.) a declaration that the tenancy was effectually determined on March 25, 1921, by the plaintiff's notice to quit.

In his statement of claim delivered on February 23, 1921, the plaintiff pointed out that the defendant was a solicitor and alleged that the landlord, who was considerably over seventy, had no separate or independent advice in connection with the indorsed memorandum, but relied on the defendant to give effect to her letter of January 18, 1919, and executed that memorandum in the belief that she was

giving an option of renewal on a yearly tenancy and not otherwise.

In his statement of defence delivered on March 21, 1921, the defendant traversed these allegations and counterclaimed for a declaration that upon the true construction of the agreement and indorsed memorandum he held the premises as tenant from year to year with the right of perpetual renewal of his tenancy during the continuance of the ground lease.

In his reply delivered on May 19, 1921, the plaintiff alleged that there was no consideration for the indorsed memorandum and that on its true construction it did not purport to confer a perpetual right of renewal.

The claim for rectification was not pressed at the trial, as the landlord was not a party. No evidence was called.

Micklem K.C. and *Copping* for the plaintiff. The memorandum is unintelligible by itself. The correspondence must be read to show in what circumstances it was executed.

In January, 1919, the defendant's tenancy was due to expire on March 25, 1919, unless he renewed for a further year under his then existing option. He offered to renew for that further year to March 25, 1920, if he might have an option to continue from year to year after that date. In each year scilicet after March 25, 1920, he was to give one month's notice of his intention to continue, and at the landlord's request he undertook to give two months' notice of his intention to leave.

This arrangement was carried out by clause 2 of the memorandum.

After March 25, 1920, the defendant became tenant from year to year by continuing in occupation under the memorandum. His notice of February, 1920, whatever form it took, could not have altered the terms of the option tenancy, which was "year to year" or nothing.

Now this tenancy from year to year so beginning on March 25, 1920, had somewhat peculiar provisions as to notices.

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The two months' notice clause is perfectly intelligible. It merely shortens the six months' notice to quit normally required from the tenant, but leaves the landlord's right to give six months' notice to quit intact. That is unobjectionable: *Allison* v. *Scargall.* (1)

But the one month's notice of intention to continue is either meaningless, as, unless determined, this year to year tenancy would continue of itself; or it defeats the landlord's right to determine and is therefore repugnant to a year to year tenancy: *Doe* v. *Browne* (2); *Browne* v. *Warner* (3); *Wood* v. *Beard* (4); *Holmes* v. *Day* (5); *Cheshire Lines Committee* v. *Lewis* (6), which is the tenancy set up in the counterclaim.

Again this memorandum is clearly not executory. It is a lease, and if renewable, as the defendant contends, it is void at law, as it is not under seal. It ought to be construed so as to be valid at law: Co. Litt. 42A, and in any case with a prima facie leaning against perpetual renewal: Foà on Landlord and Tenant, 5th ed., p. 305; *Baynham* v. *Guy's Hospital* (7); *Moore* v. *Foley.* (8) No doubt in a proper case it would be treated as an agreement and specific performance would be granted: *Parker* v. *Taswell.* (9) But if the plaintiff's allegations are well founded, no Court would grant specific performance, and the defendant has not even ventured to claim it.

Hildyard K.C. and *Roope Reeve* for the defendant. The defendant is not a mere tenant "from year to year." The plaintiff attributes far too much virtue to that expression. The parties were quite obviously only bargaining for successive annual extensions of one year at a time. In other words the defendant was to have an option to take a further year's tenancy with an option recurring year by year to renew that tenancy during the ground lease. There is no conceivable objection to that: *In re King's Leasehold Estates* (10); *Kusel*

(1) [1920] 3 K. B. 443.
(2) (1807) 8 East, 165.
(3) (1807) 14 Ves. 156, 409.
(4) (1876) 2 Ex. D. 30, 38.
(5) (1874) I. R. 8 C. L. 235.
(6) (1880) 50 L. J. (Q. B.) 121, 128*b*.
(7) (1796) 3 Ves. 295, 298.
(8) (1801) 6 Ves. 232, 237.
(9) (1858) 2 De G. & J. 559.
(10) (1873) L. R. 16 Eq. 521.

v. *Watson* (1); *Zimbler* v. *Abrahams* (2); *Mardell* v. *Curtis* (3); dissenting from *Duxbury* v. *Sandiford.* (4)

The defendant was to give one month's notice of his intention to renew, and he gave his first notice in February, 1920. He gave his next notice in January and February, 1921. If he decides not to renew in 1922 he ought to give two months' notice of his intention to leave. This notice is apparently more a matter of courtesy than contract, but in any case if he leaves without notice he will at most be liable in damages for breach of contract. His tenancy will cease if he does not renew it.

The provision for renewal being absolutely repugnant to a strict tenancy from year to year, it follows that the parties cannot have intended to create such a tenancy. The counterclaim merely follows the language of the memorandum. It is not intended to claim a strict tenancy from year to year.

The memorandum is doubtless void at law for want of a seal. But it is good in equity as an agreement: *Parker* v. *Taswell* (5), and a tenant holding under an agreement of which specific performance could be decreed is not a tenant from year to year, but is in the same position as if a lease was executed: *Walsh* v. *Lonsdale.* (6)

It is unnecessary, though always advisable, to claim specific performance: Foà on Landlord and Tenant, 5th ed., p. 15; *Furness* v. *Bond* (7); *In re King's Leasehold Estates* (8); *Zimbler* v. *Abrahams.* (2) The Court is bound to take notice of the defendant's equitable rights. There is no evidence that he is not entitled to specific performance. The allegation that the landlord mistook the legal effect of the memorandum would be no bar: *Powell* v. *Smith* (9), unless the defendant induced the mistake. (10)

Micklem K.C. in reply. In *In re King's Leasehold Estates* (8);

(1) (1879) 11 Ch. D. 129, 134.
(2) [1903] 1 K. B. 577.
(3) [1899] W. N. 93.
(4) (1898) 78 L. T. 230; reversed on appeal [1898] W. N. 161 (Record of Business).
(5) 2 De G. & J. 559.
(6) (1882) 21 Ch. D. 9, 14.
(7) [1888] W. N. 78; see also *Williams* v. *Snowden* [1880] W. N. 124.
(8) L. R. 16 Eq. 521, 527.
(9) (1872) L. R. 14 Eq. 85.
(10) See *Wilding* v. *Sanderson* [1897] 2 Ch. 534, 550.

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Kusel v. *Watson* (1); *Mardell* v. *Curtis* (2); and *Zimbler* v. *Abrahams* (3) there were no lettings expressly on a "year to year" or "week to week" tenancy, though the rent was paid yearly or weekly, as the case might be.

As to specific performance. If the defendant had counterclaimed for specific performance, the plaintiff would have called evidence to meet it. But on a mere construction action the Court cannot go into the question at all: *Wood* v. *Beard*. (4)

Cur. adv. vult.

July 29. YOUNGER L.J. This action, if a claim for rectification not pressed at the Bar be disregarded, is an action for a series of declarations met by a counterclaim for a rival declaration. The declarations are not on either side followed by any claim for effective relief. The plaintiff does not claim to recover possession. The defendant does not counterclaim for specific performance of the memorandum, void at law on his construction, but on which his claim to occupy is rested. The case very conveniently illustrates the ineffectiveness, at a pinch, of those abstract declarations which in the opinion of many judges are too much indulged in under modern procedure.

The plaintiff's argument proceeded as if his action could be regarded as a legal claim for possession to which no answer in the way of equitable relief had been put forward. The defendant, accepting the plaintiff's view of his claim, argued on the footing that his rival declaration was the equivalent of a claim to equitable relief in the form of specific performance of an agreement void at law but valid in equity. If the argument on either side had been well founded it would have been very useful to that side. But in my considered judgment neither view can be maintained.

While this action has shown that even to-day the legal system may still be a very effective champion for a litigant if the equitable system is not in terms called out to confound

(1) 11 Ch. D. 129, 134.
(2) [1899] W. N. 93.
(3) [1903] 1 K. B. 577.
(4) 2 Ex. D. 30, 38.

it, it has also shown that neither system is in fact mobilised for such a fray by a mere prayer for a declaration not followed by a claim for appropriate consequential relief.

That is certainly so with reference to the declarations sought for by the plaintiff. When he issued his writ he had no right to possession of the premises either at law or at all. The defendant's tenancy had not then on any view expired. The plaintiff's general declarations were, therefore, in no sense the equivalent of a legal claim to possession. And no claim for possession has been introduced at a later period at a date when it would have been open to the plaintiff to put it forward had he been minded to do so. In the same way the declaration sought by the defendant's counterclaim is in no true sense an appeal to the protection of a court of equity. It is directed solely to a question of construction of a document. In truth these abstract declarations, whatever else they may be, are neither law nor equity. Perhaps when that is more clearly recognized they will, to the general advantage, be less promiscuously employed. In the present case the result of their employment on both sides is that the only question properly open to finally effective decision on this record is whether the defendant at the date of the writ held his flat upon a tenancy from year to year expiring on March 25 last pursuant to the plaintiff's notice to quit. If that is the situation which results from the memorandum all questions between the parties will, I doubt not, thereby be settled. If, however, the defendant's view or some modification thereof is correct, then the result of that view, which depends upon his right to specific performance of the memorandum, cannot be determined in this action in which no claim for specific performance has been put forward directly, indirectly, or at all, while the facts show that there are many grounds on which specific performance could possibly be resisted. [His Lordship then read the agreement, the correspondence, and the indorsed memorandum, pointing out that the agreement, fairly described, was a then usual short term arrangement for the letting of a West-end flat imposing serious obligations on both sides, the possibilities of which, as for instance those

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in respect of rates and taxes, were kept within reasonable maximum limits by the fact that the agreement was operative over only a brief period: and observing that the correspondence indicated on the part of Mr. Spyer a disinclination to be bound by his obligations for even so short a term as two years. He continued:]

The plaintiff contends that this memorandum at the expiration of the year ending March 25, 1920, gives the tenant the option to continue on a tenancy from year to year, the option being exercised by his continuing in occupation after that day and the tenancy so constituted being characterised by certain provisions as to notice on his part, but carrying with it, subject to express qualification or variation, the invariable privilege in relation to such a holding of either party, including the plaintiff as landlord, to give six months' notice to determine the tenancy at the end of any current year. The defendant on the other hand contends that this memorandum provides only for an option for a tenancy of one year with a recurring option exercisable by himself or his assigns in perpetuity to renew the tenancy on the same terms in each successive year throughout the whole duration of the landlord's interest therein which, although I gather then unknown to the defendant, was in fact a term of over fifty years. Why this particular term should be selected by the defendant for the duration of the option is not quite clear. The authorities seem to show that many variants might in either direction have been selected with perhaps equal plausibility, and the uncertainty of the memorandum in this respect is one of the defendant's ultimate difficulties. But treating the defendant's contention in its broader aspects only and not in matters of detail it cannot be doubted that to attribute to this memorandum entered into in such circumstances and with reference to such a subject-matter the result claimed for it is prima facie extravagant. I do not, however, embark upon the easy task of demonstrating that extravagance, but confine myself to the more prosaic duty of determining whether the memorandum properly construed is susceptible of such an interpretation.

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Now, it will first of all be noted that the recitals in the memorandum while summarising do not textually reproduce the letters which preceded it. Both parties concurred in these letters being read so I refer to them. The variation which for present purposes is worth noting is that the words "the tenancy" are not found in the defendant's letter of January 17, 1919, which is reproduced in the second recital. More accurately as a paraphrase of that letter the recital should read thus: "Whereas the tenant has intimated to the landlord that he is prepared to continue his tenancy for a further year on the same terms as are contained in the above agreement from March 25, 1919, to March 25, 1920, if the landlord will give him an option to continue after March 25, 1920, from year to year on the same terms as are contained in the above written agreement."

The effect of omitting from the recital as drawn the words "the tenancy" would be to emphasize the words "from year to year" as the only kind of tenancy referred to, there being then no reference at all to the original tenancy of one year created by the original agreement. But this variation, quite undesigned, I am sure, is a small matter, and I disregard it. Clause 1, which speaks of "the tenancy created by the above agreement," shows I think clearly enough, as well as do the words "the tenancy" used in clause 2 by themselves, that the expression "continue the tenancy" in clause 2 only means "continue to hold the premises as tenant" and that the true effect of that clause is really that the landlord grants to the tenant "the option to continue to hold the premises as tenant after March 25, 1920, from year to year." In other words the tenant is to have an option for a tenancy from year to year as from that date, and that option is exercisable once for all merely by continuing to occupy as tenant after March 25, 1920. I say that because each of the notices mentioned in the later part of clause 2 is, I think, clearly enough, first to be given, after and not before the tenancy is constituted.

What then are the special incidents of that tenancy from year to year so created? The first is that the tenant is not

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entitled to continue after the expiration of any year ending March 25 unless before March 25 he gives one month's notice in writing of his intention to continue. The second is that against the will of the landlord he shall not on the expiration of that year be free to go unless he shall have given two months' previous notice in writing of that intention. In other words if the tenant gives neither one notice nor the other the landlord can hold him or not to his tenancy for another year as it suits the landlord so to do. The failure of the tenant to give the two months' notice deprives him of the right he would otherwise have to give up the tenancy. His failure to give the one month's notice deprives him of the right which he would otherwise have to continue it. Putting the matter in another way his right to give two months' notice shortens the normal six months' period for determining the tenancy, while he is not as against the landlord entitled to continue the tenancy at the expiration of any year unless he has given at least one month's notice of his desire. In other words the tenant is given exceptional freedom and liberty with reference to the curtailment of his obligations under this tenancy, a privilege by which, as the correspondence shows, the defendant throughout set considerable store.

Now, is there any objection in law to a tenancy from year to year in which the provisions as to notice are different on one side and on the other ? In my opinion there is none, and I accept the law laid down in *Allison* v. *Scargall* (1), where Salter J. says: "I know of nothing which prevents parties, in entering into an agreement for a tenancy from year to year, from stipulating that it should be determinable by a notice to quit shorter than the usual six months' notice ; or that the notices to quit to be given by the landlord and the tenant respectively should be of unequal length ; or that the tenancy should be determinable by the one party only by notice to quit and by the other party either by notice to quit or in some other way." Nor do the special provisions with reference to the notices of determination or of continuance by the tenant indicate in any way, as I think, that the tenancy is

(1) [1920] 3 K. B. 443, 449.

not determinable by the landlord on giving the regular six months' notice. If they did, such provisions would, I agree, be repugnant to the nature of a tenancy from year to year, for it cannot be a characteristic of such a tenancy that one of the parties to it shall have no right to determine it. Here, however, there is I think no such provision either expressly or by necessary implication.

That being the plaintiff's view, with which I agree, let me now consider whether the defendant's view of the memorandum is a possible one. It involves, first of all, a privilege of perpetual renewal. But the Courts in England lean against construing a covenant to be for a perpetual renewal unless it is perfectly clear that the covenant does so provide. Foà on Landlord and Tenant, 5th ed., p. 305; *Baynham* v. *Guy's Hospital* (1); *Moore* v. *Foley*. (2) Now, that cannot be said here. In the first place the defendant's contention practically requires the excision of the words "from year to year." These words have no place at all in the defendant's view of clause 2. Next, his construction requires that the first of the notices referred to, which that construction treats as the notice *exercising* the option, shall be given before March 25, 1920, whereas, upon the words of the clause it is, as I have already said, reasonably clear that the first of these notices will be given in the year following that date—i.e., after the option has in some other way been exercised. Again, the defendant's view is that each year's tenancy unless renewed finally terminates on March 25. If so, what consequences can flow from the omission of the tenant in any year to give the two months' notice? That omission will not prevent the tenancy coming to an end. An omission to intimate that you do not propose to exercise an option cannot by any stretch of language be described as an exercise of it. What consequences, then, would follow an omission by the tenant in this matter? So far as I can see none at all, and yet this was, as appears by the recital, the one stipulation made by the landlord. The truth is that the effectiveness of this two months' notice depends upon there being a tenancy

(1) 3 Ves. 295, 298. (2) 6 Ves. 232, 237.

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left to continue if the notice be not given. The only such tenancy here must be one from year to year. In other words, clause 2 as construed by the defendant will not work. Not only is the perpetual option he claims under it not clear; it is not there at all.

In my view the continuance as tenant from year to year is here not only the governing provision of clause 2. It is a term of art with a very definite meaning. Moreover it is entirely consonant with the short term of tenancy to which by the memorandum it is made appendant, and to ignore the words, as the defendant's construction does, and thereby introduce a most incongruous arrangement of absolutely indefinite duration, is to bring about a result which no Court of construction would impose upon the parties, unless the language employed imperiously required it. Taking this view of the case I need not deal with any other of the numerous questions discussed at the hearing.

I would only say that in my view in no circumstances could any declaration in favour of the defendant's construction be made in these proceedings without a clear saving that the question whether the memorandum as so construed was valid in equity any more than at law is not thereby prejudiced. The memorandum on the defendant's view of it is void at law as not being under seal. Whether it is enforceable in equity in view of its uncertainty, ambiguity and other matters attending it is a question which will, after evidence, require to be decided in some future proceeding.

I also think it fair to the defendant to add that this action which he is defending and in which he counterclaims is not brought by Mrs. Styles, the original landlord. She has parted with all interest in the property which has been purchased by the plaintiff, himself a professional man with the fullest notice of the memorandum. I can well understand that in a question with the plaintiff the defendant feels himself fully justified in insisting upon a position which as against his original landlord he would not perhaps have wished to set up.

There will therefore be a declaration that the defendant's

tenancy was effectually determined on March 25, 1921, by the plaintiff's notice to quit, and the counterclaim will be dismissed. The plaintiff will have the costs of the action and counterclaim.

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Solicitors: *H. J. S. Woodhouse & Co.; Guedella, Jacobson & Spyer.*

G. R. A.

BRITISH REINFORCED CONCRETE ENGINEERING COMPANY, LIMITED *v.* SCHELFF.

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[1921. B. 2316.]

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July 19, 20, 21, 22, 26.

Restraint of Trade—Covenant—Severability—Sale of small Business—Purchaser already carrying on large Business—Area of Vendor's Covenant—Test of Reasonableness.

The plaintiffs carried on a large business, extending over the whole of the United Kingdom, in the manufacture and sale of B. R. C. road reinforcements.

In 1918 the defendant Schelff and his partners, who carried on a small business for the sale (not manufacture) of Loop road reinforcements over a limited area of the United Kingdom, sold their business to the plaintiffs, and jointly and severally covenanted for a certain period neither directly nor indirectly to carry on or manage or be concerned or interested in " or act as servant of any person concerned or interested in " the business of the " manufacture or " sale of road reinforcements in any part of the United Kingdom.

The defendant Schelff having recently entered the employment of a road reinforcement company, the plaintiffs sued on the covenant:—

Held, that the servant clause was too wide in scope; e.g., it would have prevented Schelff from becoming the servant of any trust company that held shares in any road reinforcement company.

Held, also, that the servant clause being part of the main purport and substance of the one entire covenant could not be severed, though the words " manufacture or " being merely subject matter might be severed.

Attwood v. *Lamont* [1920] 2 K. B. 146; 3 K. B. 571 applied.

Held, also, that assuming severance was allowed, and assuming that Schelff had broken the rest of the covenant, which on its construction was extremely doubtful, and as to which no breach was assigned in the pleadings, the covenant was still too wide in area for the protection of the goodwill of the small business sold.

In considering the reasonableness of a covenant in restraint of trade

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entered into by a vendor on the sale of a business, the Court must merely consider whether it was reasonably necessary for the protection of the purchaser in respect of the particular business sold. The purchaser's existing businesses are not the legitimate subject of this protection, and their nature and extent must be disregarded.

Henry Leetham & Sons v. *Johnstone-White* [1907] 1 Ch. 322 applied.

Smedley's, Ld. v. *Smedley* (Note, infra, p. 580) not followed.

WITNESS ACTION.

The plaintiffs carried on (inter alia) a very large business consisting of the manufacture and sale of certain forms of steel reinforcements for the construction of concrete roads. The business extended to the whole United Kingdom and abroad. This B. R. C. reinforcement could also be applied to other purposes—e.g., concrete floors of houses. The plaintiffs did not do the road work themselves, but merely supplied the materials.

In 1915 the defendant Schelff and Allden obtained a patent for "Improvements in or relating to Ferro-Concrete Structures."

This patent was worked in partnership by Schelff, Robinson, Allden, and Spencer under the style of The Loop Road Reinforcement Company. The business was in fact confined to road reinforcement. The firm did not do the road work, or manufacture the materials. They obtained the materials from other sources and supplied them to the road contractors.

The business was very small and limited in area and there were large portions of the United Kingdom that it had never touched. From the beginning of 1917 the firm had practically stopped trading owing to the war.

In the early part of 1918 lengthy negotiations took place for the sale of the Loop business to the plaintiffs. The plaintiffs expressed their intention of working the Loop patent, but would not bind themselves to do so. The members of the firm were to have a 5 per cent. commission for all Loop orders introduced, and were to bind themselves not to engage directly or indirectly in the sale of road reinforcement for three years, which was afterwards altered to "three years after peace declared," but in every case a definite period of three years was mentioned. It was plain

on the correspondence that the 5 per cent. commission was a very substantial part of the consideration for the restrictive covenant, and it was admitted that the offer would have been idle if the plaintiffs had not intended to work the Loop.

The agreement was formally drawn up as follows :—

By an agreement under seal dated July 16, 1918, and made between Schelff, Robinson, Allden, and Spencer carrying on business in co-partnership as reinforced concrete road engineers under the style or firm of The Loop Road Reinforcement Company (thereinafter called the firm) of the one part and the plaintiffs of the other part it was agreed as follows :—

By clause 1 the firm agreed to sell and the plaintiffs to purchase

(*a*) the goodwill of the said business carried on by the firm as aforesaid ;

(*b*) the patent granted to Schelff and Allden for "Improvements in or relating to Ferro-Concrete Structures" ;

(*c*) the stock of reinforcements belonging to the firm in connection with the said business and consisting of 2820 twisted bars and 73 bundles of loop wires.

By clause 2 the consideration was to be 650*l.* for the goodwill, 600*l.* for the patent, and 120*l.* for the chattels.

By clause 3 : "During the present war and for the period of three years after the date of declaration of general peace in the present war the firm shall not nor shall any member of the firm [or the wife or widow of any member of the firm] either alone or jointly or in partnership with any other person or persons whomsoever and either directly or indirectly carry on or manage or be concerned or interested in or act as servant of any person concerned or interested in the business of the manufacture or sale of road reinforcements in any part of the United Kingdom." The words in square brackets which were in the draft were struck out in the engrossment.

By clause 4 the plaintiffs agreed to pay any of the parties

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of the first part a commission of 5 per cent. on the amount actually received in respect of any order for Loop road reinforcement introduced by him.

The purchase was completed on July 17, 1918. The purchase money was paid, the patent assigned, and the stock delivered, but the plaintiffs did not in fact work the Loop, preferring to push their own B. R. C. The members of the firm were therefore unable to earn any commission.

On January 1, 1921, Schelff having failed to obtain employment with the plaintiffs or other firms dealing in reinforced concrete entered the employment of the defendants Brown & Tawse, Ld., engineers, as manager of their reinforced material department. They were not then doing road reinforcement, so he did not mention his agreement of which he had no copy, and which he thought expired in three years from its date. In February or March Brown & Tawse took up road reinforcement, and on Schelff informing them of his agreement they appointed Hoyle to manage road reinforcement leaving Schelff to manage other reinforcements.

In April, 1921, Brown & Tawse exhibited various road reinforcements, building reinforcements, meshes, and other reinforcement materials at the Building Exhibition at Olympia. Schelff was in charge of the stall and explained the merits of the reinforcements for roads, buildings and otherwise, but avoided being actually concerned in the sale of any road reinforcement.

On April 25, 1921, after a preliminary correspondence warning the defendants that they were breaking the agreement the plaintiffs commenced this action claiming the following relief :—

1. An injunction to restrain Schelff until the expiration of a period of three years from the declaration of a general peace following on the present war from directly or indirectly carrying on or managing or being concerned or interested in [or from acting as a servant of any person concerned or interested in] the business of the [manufacture or] sale of road reinforcements in any part of the United Kingdom [and

in particular from continuing to serve Brown & Tawse, Ld., in the said business].

2. An injunction to restrain Brown & Tawse, Ld., from procuring Schelff to continue to serve them or to be concerned in the business carried on by them of the manufacture or sale of road reinforcements in the United Kingdom.

3. Damages against Schelff for breach of contract.

4. Damages against Brown & Tawse, Ld., for procuring the breach of contract.

The brackets were not in the claim, but are inserted for convenience of reference.

The breach assigned in the statement of claim was that Schelff entered into the employment of Brown & Tawse as their manager and had engaged and threatened and intended to continue to engage in vigorously canvassing for orders for and pushing the sale of certain steel concrete road reinforcements which Brown & Tawse were widely advertising and endeavouring to sell in competition with the plaintiffs. In giving particulars the plaintiffs referred to the building exhibition and alleged that the defendants were canvassing and obtaining orders from road surveyors for road reinforcements and that Schelff "acting as the manager and servant" of Brown & Tawse had taken charge of and assisted in those acts and had procured certain orders therein mentioned.

They also alleged that Brown & Tawse, although expressly warned of the restrictive covenant, had continued to employ Schelff as their manager, and were thereby procuring a breach of contract.

At the hearing the action was stayed against Brown & Tawse on certain terms, including an undertaking to abide by the result of the action against Schelff.

Schelff's main defence was that, having regard to the nature and extent of the small business sold, the covenant was much wider in scope and area than was reasonably necessary for the plaintiffs' protection. He also took the point that even if valid, it was only valid as a protection to the Loop goodwill, which the plaintiffs had practically killed. In any

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case, as the plaintiffs had failed to work the Loop patent, as virtually promised, and Schelff was thereby deprived of his anticipated commissions, it would be inequitable to grant an injunction.

Luxmoore K.C. and *Rudolph Moritz* for the plaintiffs. Goodwill denotes the benefit arising from connection and reputation; and its value is what can be got for the chance of being able to keep that connection "and improve it": Lindley on Partnership, 8th ed., p. 507. In considering therefore the reasonableness of a restrictive covenant on the sale of a business, the Court must regard not merely the old area of the business sold. It must also consider what to the vendor's knowledge the area of that business will become in the purchaser's hands as part of his existing business. In other words it must consider both businesses. The present covenant is clearly not too wide to protect the amalgamated business of B. R. C. and Loop.

The exact point was decided in *Smedley's, Ld.* v. *Smedley* (1) after a strenuous argument to the contrary. But there are indications in other authorities pointing the same way—namely, that the business and interests of the covenantee purchaser are considered as well as those of the covenantor vendor: see, for instance, *Maxim Nordenfelt Guns and Ammunition Co.* v. *Nordenfelt* (2); *Mason* v. *Provident Clothing and Supply Co.* (3); *Herbert Morris, Ld.* v. *Saxelby* (4); *Rousillon* v. *Rousillon* (5); *Badische Anilin und Soda Fabrik* v. *Schott.* (6)

Micklem K.C. and *Alfred Adams* for the defendant Schelff. The covenant is merely allowed as a protection to the plaintiffs in respect of the business sold, and its reasonableness must be measured accordingly.

The present covenant is obviously far too wide in scope. It would prevent Schelff from entering the employment of a trust company which happened to hold shares in a road

(1) Note infra, p. 580.
(2) [1893] 1 Ch. 630, 664, 673; [1894] A. C. 535, 548, 552, 561, 565–567.
(3) [1913] A. C. 724, 737, 738.
(4) [1915] 2 Ch. 57, 90; [1916] 1 A. C. 688, 700, 701, 706–709, 713.
(5) (1880) 14 Ch. D. 351, 365.
(6) [1892] 3 Ch. 447, 451.

reinforcement company. It also extends to manufacturing, which the Loop company never attempted.

Again it is far wider in area than the Loop company's small business, which is the test for reasonableness. The plaintiffs' business is irrelevant on that point. *Smedley's, Ld.* v. *Smedley* (1), which was only decided on an interlocutory motion, is really contrary to the authorities cited and to *Attwood* v. *Lamont.* (2)

A covenant in gross in restraint of trade is unreasonable and void: *Townsend* v. *Jarman* (3) approved in *Dewes* v. *Fitch.* (4) But so far as this covenant goes beyond the reasonable protection of the business sold, it is a mere covenant in gross against competition and as such void.

William Hereward and *Vyvyan E. Faning* for Brown & Tawse consented to the terms of stay.

Luxmoore K.C. in reply. I must admit that the covenant is too wide in scope as to the "acting as servant" clause and also as to "manufacture." But it is really a combination of several distinct covenants which can be severed with a blue pencil: *Attwood* v. *Lamont.* (5) The plaintiffs can strike out the bracketed clauses of the injunction claimed.

[YOUNGER L.J. Your whole action is based on a breach of the servant clause, which you now admit is invalid. Can you sever in reply and obtain an injunction on the remaining part of the covenant without amending and assigning a new breach? You would only have leave to amend on some terms as to costs.]

I do not ask to amend. I merely wish to limit the injunction by striking out the bracketed clauses.

Micklem K.C. in rejoinder. If the bracketed words are struck out there has been no breach of the covenant. In this covenant the words "carry on or manage or be concerned or interested in" clearly mean "otherwise than as a servant," as "acting as servant" is dealt with in the bracketed clause immediately following.

(1) Note infra, p. 580.
(2) [1920] 2 K. B. 146, 154; 3 K. B. 571, 579, 580.
(3) [1900] 2 Ch. 698, 702.
(4) [1920] 2 Ch. 159, 188.
(5) [1920] 3 K. B. 571, 593.

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Again severance is not a matter of right. The Court must find in the agreement itself sufficient grounds for making the severance: *Mills* v. *Dunham* (1); *Mason's Case* (2); *Attwood* v. *Lamont.* (3)

Cur. adv. vult.

July 26. YOUNGER L.J. [after stating the facts and reading the correspondence and the agreement:] The effect of the correspondence before the agreement is to emphasise two points. First, that the period of the restriction mentioned throughout was a definite period of three years fixed at first from the date of the agreement and later from the end of the war. Secondly, there is a close connection between the 5 per cent. commission and the restriction on trade. The two are treated together throughout, and it must have been recognized that the offer of commission was of no value had there not been a manifested intention to work the Loop. This indeed was frankly admitted in the plaintiffs' evidence.

The result is that the Loop patent never having in fact been worked, or in any way exploited or advertised by the plaintiffs, the agreement to pay a commission for the introduction of work has proved, in Mr. Butler's own words, to be an idle one. The defendant, to say nothing of his former partners, has had no advantage at all from that bargain, which I am satisfied from the correspondence was a substantial consideration offered as a return for the stringent restrictive covenant to which they submitted. The natural connection between two such clauses is neatly illustrated by Lord Robertson in *General Billposting Co.* v. *Atkinson* (4), and the total failure of consideration on one side in this respect while not, I agree, involving any breach of contract on the part of the plaintiffs may well have an important bearing upon the question, whether the case is one for an injunction to enforce performance of the defendant's corresponding restrictions.

But the complete failure to work the Loop patent is perhaps more important for another reason—namely, that the

(1) [1891] 1 Ch. 576, 580.
(2) [1913] A. C. 724, 742, 745.
(3) [1920] 3 K. B. 571, 595.
(4) [1909] A. C. 118, 121.

cessation of all business by the firm for eighteen months before the agreement and the complete withdrawal from the market since of the Loop system and everything connected with it, has, I cannot doubt, effectually killed any reputation, if any there was, made by that system during its short and very restricted active existence. It is as dead as the "Lock-Mesh" to which Mr. Butler referred in his evidence. [His Lordship then referred to Mr. Schelff's subsequent employments above stated, and to the pleadings in the action, and continued:] Now the claim in this action, like the letters which preceded it, framed as it is both against Schelff and against Brown & Tawse, is directed to the breach by Schelff of that part of his agreement which precludes him "from acting as a servant of any person concerned or interested in the business or manufacture or sale of road reinforcements in any part of the United Kingdom." That is the only breach clearly assigned in the statement of claim from which the right to an injunction is alleged to flow. But after it had been pointed out that that part of the covenant would preclude Schelff from becoming the servant say of a trust company which as part of its investments held shares say in Brown & Tawse, Ld., and that such a prohibition could in no way be necessary for the protection of any business of the plaintiffs, it was admitted by Mr. Luxmoore in his reply that this part of the restriction was invalid and could not be supported. He then claimed to sever it from the rest of the clause, excluding any reference to it from the injunction, but declined, after consideration, to amend his statement of claim, which I intimated could only at that late stage be allowed on some terms as to costs.

The first question therefore is whether seeing that the action as framed rests on the part of the covenant now sought to be jettisoned, severance is at this stage permissible. In my opinion without amendment of the pleadings so as to make a proper assignment of breach in respect of some part of the covenant which after severance still survives, the action must fail. The plaintiffs have now arranged with Brown &

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Tawse, Ld., by a consent order, but the position may be tested by inquiring how on the present pleading any case against them could be maintained if the clause in question were cut out of the restriction. As against them there appears clearly to be no case left.

But I should be sorry to decide a case of such importance to the parties on a mere point of pleading, and accordingly, I go on to consider whether this severance is permissible at all. In some respects the covenant is too wide to be supported. It is admittedly too wide in scope in the respect I have just mentioned; and if the legitimate purpose of the covenant is the protection of the business sold as distinct from the purchasers' other business it is too wide in area. It is also admittedly too wide in scope in that it extends to the manufacture of road reinforcements as well as their sale. The Loop firm never at any time manufactured reinforcements. Now in this last respect the covenant can, I think, quite properly be severed. This is a severance in respect of the subject matter of the restriction which is fully justified by the authorities. But to cut out the servant clause from the agreement is another matter altogether.

All the cases on this subject were cited to the Divisional Court in *Attwood* v. *Lamont* (1), and Bailhache J. stated their effect as follows: "Covenants of this kind are severable where the severance can be effected by striking out restrictions which are excessive with respect to area or subject matter or classes of customers, provided any such restriction is so expressed that it can be dealt with as a separate negative obligation, but the Courts will not split up a single restriction expressed in indivisible terms. As Mr. Matthews put it, the Courts will sever in a proper case where the severance can be performed by a blue pencil but not otherwise."

Now while the desired severance here may be performed by a blue pencil, it is not sought either in respect of area, subject matter or class of customer, the only matters in respect of which this privilege has hitherto been permitted, and, I cannot think after Lord Moulton's observations in

(1) [1920] 2 K. B. 146, 148, 155.

Mason's Case (1) that this process will be extended, even in the case of a vendor's covenant, to a case not hitherto covered by authority where the excess is not of trivial importance and is part of the main purport and substance of the clause. To my mind there is reason for not carrying the principle so far as is here required. Its application does not authorize the making of a new contract for the parties and the particular clause now in question is really a principal if not the main approach to the business of the sale of road reinforcements, all access to which it is the purport of the covenant to bar so as to prevent the covenantors from having any part or lot whatsoever in it during the period of restriction. Like the covenant in *Attwood* v. *Lamont* (2) it is merely a part of one entire covenant in mosaic, and to permit the severance asked would, I think, be to go further than has ever yet been permitted in such a case.

I will, however, contrary to my opinion, assume that the covenant may be severed as desired. The question then arises whether of the covenant which remains there has been any breach by the defendant.

Now the effect of severing by striking out with a blue pencil the obnoxious part of a covenant is not to alter or affect the construction of what is left. That must be construed as if the portion struck out still remained, and so construing this covenant, I strongly incline to Mr. Micklem's view that the words "managing or being concerned or interested in the business" must be construed as meaning "managing or being concerned or interested otherwise than as a servant." It may well be that if the severed clause had never stood part of the covenant the expression "managing or being concerned" might prohibit the covenantor from becoming an employé in the business, but the word "interested" would not do so: *Gophir Diamond Co.* v. *Wood.* (3) Nor would the other expressions in this covenant necessarily do so, for as pointed out by Swinfen Eady J. (3), if it had been intended to extend them to cover agreements of service it would have been easy

(1) [1913] A. C. 724, 745. (2) [1920] 2 K. B. 146; 3 K. B. 571, 593.
(3) [1902] 1 Ch. 950, 952.

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for the parties to add the very clause which they have here made part of their agreement.

And with that clause there all the words with which we are now dealing have a proper signification attributable to them without importing into them any relation of service or employment which is dealt with in a clause of its own. "Managing" in this view whenever it occurs is used to cover the active management otherwise than as servant of another, so that even if management by Schelff of the sale of the road reinforcements of Brown & Tawse had in fact been proved, that management would not have involved any breach by Schelff of that part of the covenant. But having formed an opinion adverse to the plaintiffs on a further part of the case it is unnecessary for me to decide this question one way or the other, and I will assume that properly construed Schelff has broken the severed covenant.

The question then arises whether that covenant, even after severance, was not still too wide for the reasonable protection of the plaintiffs at the time it was entered into. I am of opinion that it was. This raises the most important legal question in the case—namely, whether in an agreement for sale of a business the reasonableness of a vendor's restrictive covenant is to be judged by the extent and circumstances of the business sold or by the extent and range of any business of the purchaser of which after transfer to him it is to form a part.

The plaintiffs' claim here is based on the hypothesis that the legitimate subject of protection is the plaintiffs' business, and there can, I think, be no doubt that the restrictive covenant is framed with reference to the requirements of that business and no other. Its extravagance in range as applied to the altogether insignificant business sold hardly requires statement.

Now but for one unreported case before Sargant J. (1) I should have thought that the law on this subject was clear. It is the business sold which is the legitimate subject of protection, and it is for its protection in the hands of its purchaser,

(1) Note infra, p. 580.

and for its protection only, that the vendor's restrictive covenant can be legitimately exacted. A restrictive covenant by a grocer on the sale of his business in a country town, if it would be unreasonable and void when the purchaser was acquiring it as his sole business, does not become valid if the purchasers are, say, Messrs. Lipton, with branches everywhere. The point is perhaps most clearly brought out in those recent cases in the House of Lords in which the essential distinction between vendors' and employés' restrictive covenants has been so clearly laid down. Take, for instance, the justification for a wider vendor's covenant in Lord Shaw's speech in *Mason's Case* (1): "If the contract, for instance, be for the sale of a business to another for full consideration or price, there may be elements going in the strongest degree to shew that such a contract—in so far as it restrains the vendor from becoming a rival of the business whose goodwill he has sold and which he has bargained he shall not oppose—. . . . is enforceable, and, indeed, that a declinature by the law to enforce it would amount to a denial of justice." Again in *Saxelby's Case* (2) Lord Parker says: "In the *Nordenfelt Case* (3) that which it was required to protect was the goodwill of a business transferred by the covenantor to the covenantee, and that against which protection was sought was competition by the covenantor throughout the area in which such business was carried on." He does not say "going to be carried on." Take again Lord Watson's observations in the *Nordenfelt Case* (3): "I think it is now generally conceded that it is to the advantage of the public to allow a trader who has established a lucrative business to dispose of it to a successor by whom it may be efficiently carried on. That object could not be accomplished if, upon the score of public policy, the law reserved to the seller an absolute and indefeasible right to start a rival concern the day after he sold. Accordingly it has been determined judicially, that in cases where the purchaser, for his own protection, obtains an obligation

(1) [1913] A. C. 724, 737. (2) [1916] 1 A. C. 688, 708.
(3) [1894] A. C. 535, 552.

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restraining the seller from competing with him, within bounds which having regard to the nature of the business are reasonable and are limited in respect of space, the obligation is not obnoxious to public policy, and is therefore capable of being enforced. Whether—when the circumstances of the case are such that a restraint unlimited in space becomes reasonably necessary in order to protect the purchaser against any attempt by the seller to resume the business which he sold—a covenant imposing that restraint must be invalidated by the principle of public policy is the substance of the question which your Lordships have to consider in this appeal." Lord Herschell in the same case says (1): "I think that a covenant entered into in connection with the sale of the goodwill of a business must be valid where the full benefit of the purchase cannot be otherwise secured to the purchaser." In all these cases the business sold is treated as the subject of permissible protection; and similar judicial utterances could be indefinitely multiplied.

And in my judgment when the matter is looked at on principle these statements necessarily mean what they say. A covenant in gross against trading, however great the consideration, is void. A covenant only exacted for the protection of a business with which the covenantor has never had any connection is for this purpose no better than a covenant in gross. Authority for this if required will be found in *Henry Leetham & Sons* v. *Johnstone-White* (2), a decision given before *Mason's Case* (3), and therefore given before the essential difference between vendors' and employés' covenants had been expounded by the House of Lords. From that it follows that although *Leetham's Case* (2) related to an employé's covenant, the principle laid down by the Court of Appeal remains applicable to all restrictive covenants of this kind. In that case the question was whether the employé could be bound by a covenant designed to protect a business of his employers in which he had never been employed. Farwell L.J. says: "It is quite plain that,

(1) [1894] A. C. 548. (2) [1907] 1 Ch. 322, 326.
(3) [1913] A. C. 724.

regarded as a contract for the protection of the Cleveland Company alone, clause 4 is manifestly unreasonable as being far wider than can possibly be required for the protection of that company. But it is argued . . . . that the contract is entered into by the individual on behalf of a great number of companies, and . . . . should be regarded as one for the protection, not of the Cleveland Company, whose servant the defendant became, but of all or any of the Cleveland Company or the companies, one of [which] has indeed a very large business. . . . . Such a contract is contrary to the very principle on which these contracts are allowed . . . . notwithstanding that they are in restraint of trade, and therefore against public policy. . . . . An individual . . . . dealing with a business . . . . built up by his own exertions is entitled to protect that business so as to enhance its value, but a contract restraining trade is only good if and so far as it is for the protection of that business. For instance, it has been decided in *Horner* v. *Graves* (1) that you cannot have a covenant in gross—that is to say, a man who has no interest in the business at all cannot take a covenant from a man that he will not enter into that particular business ; it does not concern him, and it is against public policy, because it restricts trading in the United Kingdom. In the same way it follows . . . . that a man whose business is a corn miller's business, and who requires to protect that, cannot, if he has also a furniture business, require . . . . an employee in the corn business to enter into covenants restricting him from . . . . competition . . . . in the furniture business also, because it is not required for the protection of the corn business in which the man is employed, however much it may be beneficial to . . . . the owner both of the corn business and of the furniture business." It seems to me that every word of that judgment applies to the present case, and that the principle is as I have stated it.

But Mr. Luxmoore relied very strongly on Mr. Justice Sargant's decision of *Smedley's, Ld.* v. *Smedley* (2), and supplied the Court with a shorthand note of the judgment. In that case in 1915 the defendant was carrying on a

(1) (1831) 7 Bing. 735. (2) Note infra, p. 580.

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dentist's business at 20 Camberwell Green and 247 Camberwell Road. On October 11, 1915, he entered into an agreement to sell the Camberwell Green business to the plaintiffs. This agreement contained the following clause: "The vendor undertakes that he will not commence or be concerned in any way with any business of a similar or competing nature within one mile of any of the [plaintiffs'] premises always excepting the premises now occupied by him and the business carried on by him at 247 Camberwell Road or any premises he may take in substitution for such premises." The plaintiffs at that date had a business at 27 Grand Parade, Brighton. The defendant thereafter opened a competing business within one mile of that Brighton address. The motion was to restrain him from carrying on that business. In the course of his judgment dealing with that motion Sargant J. says: "The defendant merely contends that the covenant is wider than was reasonably necessary for the protection of the particular business sold. He contends that the Court ought not to consider what was reasonably necessary for the protection of the three businesses already carried on by the purchasers at the time of the sale, but to confine its attention only to the business actually sold and consider whether the covenant was reasonably necessary for the protection of the goodwill of that particular business. That is an entirely novel argument. I have never heard it before, nor have I been referred to any authority justifying it." In support of this view he reads a passage from Lord Atkinson's judgment in *Saxelby's Case*. (1) I will refer to that passage in a moment. Now it appears to me that on that motion the learned judge cannot have had the same assistance that has been rendered to me. His attention was not called to *Leetham's Case* (2) nor definitely to the passages I have read in the judgments of the House of Lords. His conclusion was based exclusively on the following passage from the judgment of James V.-C. in *Leather Cloth Co.* v. *Lorsont* (3), which he extracted from the speech of Lord

(1) [1916] 1 A. C. 688, 701. (2) [1907] 1 Ch. 322, 326.
(3) (1869) L. R. 9 Eq. 345, 354.

Atkinson in *Saxelby's Case* (1)—namely: "The principle is this: Public policy requires that every man shall be at liberty to work for himself, and shall not be at liberty to deprive himself or the State of his labour, skill, or talent, by any contract that he enters into. On the other hand, public policy requires that when a man has by skill or by any other means obtained something which he wants to sell, he should be at liberty to sell it in the most advantageous way in the market; and in order to enable him to sell it advantageously in the market it is necessary that he should be able to preclude himself from entering into competition with the purchaser. In such a case the same public policy that enables him to do that does not restrain him from alienating that which he wants to alienate, and, therefore enables him to enter into any stipulation however restrictive it is, provided that restriction in the judgment of the Court is not unreasonable, having regard to the subject matter of the contract." But if *Leather Cloth Co.* v. *Lorsont* (2) is looked at, it will be found that the only business in question there was the business sold by the defendant to the plaintiff company promoted and incorporated to acquire and carry it on. The point now in question was accordingly in no way in issue.

Now there were special circumstances in *Smedley's, Ld.* v. *Smedley* (3) to which I have not alluded and which no doubt amply justified Sargant J.'s interlocutory injunction, if his decision depends on the principle enunciated by him. I am not, I think, at liberty to follow it, because it seems to me very respectfully to be at variance, not only with principle but with previous decisions binding both on him and on me.

In my judgment, therefore, this severed covenant must be judged only with reference to the goodwill of the business sold, and so judged it is far wider than is necessary for the reasonable protection of the plaintiffs. It was suggested that without this covenant the covenantors might the next day have brought out a new and improved patented process and

(1) [1916] 1 A. C. 688, 701. (2) L. R. 9 Eq. 345.
(3) Note infra, p. 580.

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so have deprived the plaintiffs of all advantage from the sale. But the answer is that the plaintiffs have neither purchased nor paid for such process. The covenant here is not appropriate to secure them against its discovery: see *Printing and Numerical Registering Co.* v. *Sampson* (1); and was neither designed nor is it appropriate to give the plaintiffs that kind of protection. It is true that the transfer of the patent ipso facto precluded the covenantors from carrying on without the plaintiffs' licence the only business in which they had ever engaged, but this fact does not in my judgment justify a covenant wider in range than that which would have been permissible if the carrying on of their business apart from the covenant had still been open to them.

I need not further consider whether the duration of the covenant is reasonable even in relation to the plaintiffs' business, the magnitude of which may hardly be sufficient to justify a covenant unrestricted in space for so considerable a term; nor need I consider whether, seeing that the business sold is in no sense being carried on so that the only subject of protection is non-existent, and seeing also that thereby the defendant Schelff has lost all chance of earning the commission which was one consideration for his covenant, the case would in any circumstances have been one for an injunction. There are already sufficient grounds for holding that the plaintiffs' claim has not been established; and I dismiss their action with costs.

Solicitors: *Church, Adams, Prior & Balmer, for Cobbett, Wheeler & Cobbett, Manchester; Stokes & Stokes.*

G. R. A.

NOTE.

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SMEDLEY'S, LIMITED *v.* SMEDLEY.

[1918. S. 997.]

MOTION.

The plaintiffs were a limited company founded by the defendant's father in May, 1913, to take over and carry on the business of unregistered dentists, and the manufacture of artificial teeth carried on by him at Peckham, Brompton and 27 Grand Parade, Brighton. The defendant's father was

(1) (1875) L. R. 19 Eq. 462.

a large shareholder. The defendant had assisted his father at all three places of business both before and after the company was formed.

In 1915 the defendant was carrying on a similar business at two addresses—namely, 20 Camberwell Green and 247 Camberwell Road.

By an agreement of October 11, 1915, the defendant sold the Camberwell Green business to the plaintiffs for 120*l.* and undertook not to "commence or be concerned in any way with any business of a similar or competing nature within one mile of any of the [plaintiffs'] premises, always excepting the premises now occupied by him and the business carried on by him at 247 Camberwell Road," or premises taken in substitution not nearer 20 Camberwell Green than the distance therein mentioned.

On or about April 22, 1918, the defendant started a similar business within a mile of the Brighton premises.

On May 27 the plaintiffs commenced this action for an injunction to restrain the defendant from carrying on a business similar to the plaintiffs' within one mile of the Brighton premises or within one mile of the other premises they occupied on October 11, 1915, and at which they might for the time being be carrying on their business.

H. B. Vaisey for the plaintiffs.

Fairfax Luxmoore for the defendant relied upon the *Nordenfelt Case* (1); *Trego* v. *Hunt* (2); *Mason's Case* (3); *North Western Salt Co.* v. *Electrolytic Alkali Co.* (4); and *Saxelby's Case* (5); and contended that the restriction must be limited to the protection of the business sold. The present restriction also protected the purchasers' other businesses and was therefore unreasonable.

SARGANT J. [after stating the facts]. For the purposes of the motion the defendant admits that the covenant merely protects the Peckham, Brompton, and Brighton premises, and probably, though this is not material on this motion, the Camberwell Green premises. Undue influence or duress, though raised in the defendant's affidavit, is naturally not put forward as a defence on the motion, and the absence of any time limit is not relied on. The defendant merely contends that the covenant is wider than was reasonably necessary for the protection of the particular business sold. He contends that the Court ought not to consider what was reasonably necessary for the protection of the three businesses already carried on by the purchasers at the time of the sale, but to confine its attention only to the business actually sold, and consider whether the covenant was reasonably necessary for the protection of the goodwill of that particular business. That is an entirely novel argument. I have never heard it before, nor have I been referred to any authority justifying it.

In *Saxelby's Case* (6), Lord Atkinson, reading and adopting the judgment of James V.-C. in *Leather Cloth Co.* v. *Lorsont* (7), said: "All the cases . . . . establish this principle, that all restraints upon trade are bad as being in violation of public policy, unless they are natural, and not unreasonable for the protection of the parties in dealing legally with some subject matter of contract. The principle is this: Public policy requires

(1) [1894] A. C. 535, 565.
(2) [1896] A. C. 7.
(3) [1913] A. C. 724, 733, 737, 738.
(4) [1914] A. C. 461.
(5) [1916] 1 A. C. 688, 708.
(6) [1916] 1 A. C. 688, 701.
(7) L. R. 9 Eq. 345, 353.

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that every man shall be at liberty to work for himself, and shall not be at liberty to deprive himself or the State of his labour, skill, or talent, by any contract that he enters into."

The defendant does not contend that public policy is in any way concerned in this particular matter, and it certainly strikes me that if the result of the covenant is that a certain unregistered dentist should not be able to carry on business within three or four areas, each of a mile radius, throughout the United Kingdom, the public are in no way prejudiced. [His Lordship then read the rest of the passage quoted by Lord Atkinson and hereinbefore set out at p. 579, and continued:] I see nothing in that passage to point to this: that, if a vendor can obtain a better price for the goodwill of a business by entering into a covenant not to compete with the purchaser either in respect of the business sold or in respect of an existing business of the purchaser, that is not a reasonable stipulation for the purpose of enabling the vendor to obtain a better price for the business he is selling and the goodwill he has built up. In my experience these covenants are as a rule entered into with reference to the purchaser's business, or at any rate with reference to the combined business that will be carried on consisting of the business sold and the purchaser's previous business. It would very seriously hamper a vendor in disposing of his business if he were only permitted to covenant to protect the goodwill of the business actually sold. That indeed would hardly enable him to give more to the purchaser than would be implied by a mere conveyance of the goodwill itself without any restrictive covenants.

Now looking at the subject matter, the narrow areas of restriction, the easy communication between London and Brighton, and the fact that the plaintiffs find it profitable to carry on these three businesses in conjunction, it seems to me as a matter of ordinary common sense that no unreasonable restriction was imposed on the vendor. I note the careful way he provided that the sale of the Camberwell Green business should in no way prevent him from developing his Camberwell Road business, with a change of locality if necessary. There are plenty of areas in Brighton for the defendant outside the mile radius. He did at first start at Hove, but now he has come too near. There is also this important consideration which I omitted to mention —namely, that the defendant has the same surname as the plaintiffs, who were formed to acquire the benefit of his father's surname. That is an additional reason in support of the reasonableness of the covenant in the particular case.

There will be an injunction until the trial, but if before the order is drawn up the defendant is willing to treat the motion as the trial, the injunction will be perpetual.

The motion was subsequently treated as the trial.

Solicitors: *Radford & Frankland, for J. Lord Thompson, Brighton; C. R. Sawyer & Withall, for John C. Buckwell, Brighton.*

G. R. A.

In re DIAMOND T MOTOR CAR COMPANY.

P. O. LAWRENCE J.

1921

July 8, 13, 27.

[1919. D. 411.]

Trade Mark—Foreign Mark—Combination Mark—Distinctiveness—User—Registrable Mark—Trade Marks Act, 1905 (5 *Edw.* 7, *c.* 15), *ss.* 9, *sub-s.* 5; 12, 19—*Trade Marks Act*, 1919 (9 *&* 10 *Geo.* 5, *c.* 79), *s.* 8, *sub-s.* 2.

Sub-ss. 1 to 5 of s. 9 of the Trade Marks Act, 1905, are separate and distinct, and the expression "any other distinctive mark" in sub-s. 5 means a distinctive mark other than the mark designated in sub-ss. 1 to 4. Therefore when a mark is claimed to be registrable under sub-s. 5 the only essential particular s. 9 requires is that it should be distinctive, and there is nothing in the section which requires that the mark should also contain one or more of the essential particulars designated in sub-ss. 1 to 4.

An American company and its predecessor in business had carried on from 1905 the manufacture and sale of motor vehicles at Chicago in the United States of America, and from the inception of the business had used as its trade-mark a combination device consisting of the capital letter "T" across which the word "Diamond" was impressed in block print, the whole being enclosed within a double diamond-shaped border. This device was registered as the company's trade-mark in the United States of America and many other countries abroad and in the British Colonies. In 1919 the company, before introducing the sale of its vehicles into the United Kingdom, applied under s. 9, sub-s. 5, of the Trade Marks Act, 1905, to register its trade-mark for motor vehicles in class 22. The registrar refused the application on the ground (inter alia) that the mark as a whole was not distinctive, the diamond-shaped border being common to the trade. On appeal to the Court :—

Held, on the evidence, that the mark considered as a whole was adapted to distinguish the vehicles of the company from those of other manufacturers, and was a distinctive mark registrable under s. 9, sub-s. 5, subject to the company disclaiming any right to the exclusive use of a diamond-shaped border and of the word "Diamond."

In re Bradley's Trade Mark (1892) 9 R. P. C. 205, and *In re Price's Patent Candle Co.* (1884) 27 Ch. D. 681, decisions under the Patents Act, 1883, held not applicable.

MOTION.

This was an appeal from the refusal of the Registrar of Trade Marks to proceed with an application for the registration of a trade-mark.

On January 21, 1918, the Diamond T Motor Car Co., an American corporation carrying on business at Chicago, in the United States of America, applied under s. 9, sub-s. 5, of the Trade Marks Act, 1905, for the registration in class 22

P. O. LAWRENCE J. 1921 DIAMOND T MOTOR CAR CO., *In re.*

in respect of motor-cars and motor trucks of its trade-mark consisting of the letter " T " in large block print across which the word " Diamond " was superimposed in capital letters, the whole being arranged and enclosed within a diamond-shaped border of double lines. The registrar refused the application under ss. 9, 12, and 19 of the Act on the ground that the mark as a whole was not distinctive; and also in the exercise of his discretion held that as the diamond-shaped border was common to the trade in class 22, the registration of the mark might cause embarrassment in the trade and would be calculated to deceive the public.

The company gave notice of motion by way of appeal from the decision of the registrar and filed further evidence as follows. The business of the company was founded by C. Tilt in the year 1905 at Chicago and was carried on under the name of the Diamond T Motor Car Co. until 1915, when the company was incorporated under the same name under the laws of the State of Illinois, and thereupon took over and had ever since carried on the same business on the same lines as before. The business consisted in the manufacture and sale of motor-cars and motor trucks or lorries. The trade-mark in question was adopted by C. Tilt on the commencement of the business in 1905 and had ever since been used by him and his successors in the business. The trade-mark was registered in the United States of America, in many other countries abroad, and in Canada, British India, New Zealand, Australia and South Africa. This company's goods and trade-mark had been extensively advertised and sold in the United States of America, where its trade-mark had served to distinguish its goods from those of other manufacturers and had been rendered distinctive of the company's goods. The trade-mark had always been used upon the goods of the company and had also been made a prominent feature in all the company's stationery, notices, catalogues, advertisements, show-cards and other publications. Some of these publications circulated in the United Kingdom, and the company had received inquiries about its goods from persons in the United Kingdom. The company now intended

to introduce the sale of its goods in the United Kingdom, but were desirous of first protecting its trade-mark by registration here.

By the direction of the registrar the notice of motion was served upon the registered proprietors of three of the registered marks in class 22 which contained a similar diamond-border device. The proprietors of two of these marks, numbered respectively 90,092 and 344,980, did not oppose the company's application. The third mark, No. 282,388, had been removed from the register for non-payment of fees, but the company bought up any rights that might be connected with it.

Sir D. Kerly K.C. and *L. B. Sebastian* for the company. Having regard to s. 8, sub-s. 2, of the Trade Marks Act, 1919, the Court is not bound by the discretion of the registrar but can exercise its own discretion in the matter. The sole question is whether the mark is distinctive. It is a combination mark and the distinction between it and the three other registered marks is so obvious as to prevent any probability of deception: *Hubbuck & Son* v. *Brown, Sons & Co.* (1) The company do not claim the diamond-shaped border which is common to the trade, but contend that the mark, considered as a whole, is distinctive of its goods. The fact that the mark is registered as the company's trade-mark in the United States and many other countries abroad and has been used for many years in connection with the company's goods is an important element for consideration by the Court: *In re National Cash Register Co.* (2); *In re H. G. Burford & Co.* (3)

Dighton Pollock for the registrar. No doubt the Court has full discretion in the matter, but will attach importance to the discretion of the registrar, and if a case is on the border line it will not interfere with his discretion. The Court has to consider whether the mark is distinctive within the meaning of s. 9 of the Act of 1905. It is submitted that the mark is not within one of the essential particulars of a registrable mark in sub-ss. 1 to 4, and is not adapted to

(1) (1900) 17 R. P. C. 638, 644.
(2) (1917) 34 R. P. C. 273, 282.
(3) [1919] 2 Ch. 28, 38, 46; 36 R. P. C. 139, 145, 150.

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distinguish the goods of the company. The diamond-shaped border is common to the trade (Kerly on Trade Marks, 4th ed., p. 526), the word "Diamond" carries it no further, and the letter "T" is an initial and not registrable: *In re Garrett's Trade Mark.* (1) A combination consisting of a double oval enclosing a word was held not distinctive in *In re Bradley's Trade Mark* (2) and *In re Price's Patent Candle Co.* (3) As to user: the mark must have been used as a trade-mark in the United Kingdom (Kerly on Trade Marks, 4th ed., p. 230, *Jackson & Co.* v. *Napper* (4)), and to establish user there must have been sales in the United Kingdom. The Court cannot regard the sales abroad. Advertisements are not enough. There had been actual sales in this country in *In re National Cash Register Co.* (5) and *In re H. G. Burford & Co.* (6) Lastly, the mark so resembles the three marks on the register that it is calculated to deceive or to cause confusion, but if the application is to proceed it is submitted that the diamond border and the word "Diamond" should be disclaimed.

Sir D. Kerly K.C. in reply. We rely on the expression "any other distinctive mark" in sub-s. 5, and the definition of the word "mark" in s. 3 of the Act. It is submitted that sub-ss. 1 to 5 in s. 9 are to be treated as separate and distinct: *The Solio Case.* (7) The word "Diamond" is not common to the motor trade. We claim this mark as a combination, and contend that the totality of the mark must be considered. We submit the company is not bound to disclaim any part of the mark, but would submit to disclaim the diamond border.

Cur. adv. vult.

July 27. P. O. LAWRENCE J. This is an appeal from the refusal of the Registrar of Trade Marks to proceed with an application by the Diamond T Motor Car Co. for the registration of a Trade-mark No. 381,544 in Class 22 in respect of motor-cars and motor trucks.

(1) [1916] 1 Ch. 436, 444.
(2) 9 R. P. C. 205, 207.
(3) 27 Ch. D. 681, 685.
(4) (1886) 35 Ch. D. 162, 177.
(5) 34 R. P. C. 273.
(6) [1919] 2 Ch. 28.
(7) [1898] A. C. 571, 579.

Sect. 8, sub-s. 2, of the Trade Marks Act, 1919, enacts that in such an appeal the Court shall have and exercise the same discretionary powers as, under the Trade Marks Act, 1905 and 1919, are conferred upon the registrar. Since this enactment the Court is no longer fettered by reason of the registrar on the hearing before him having exercised his discretion.

The applicants' trade-mark is a combination mark composed of three elements—namely, (1.) A double diamond-shaped border; (2.) The word "Diamond" in block type placed horizontally within the border; and (3.) the letter "T" in larger block type also placed within the border in such a position that the down stroke of the "T" intersects the letter "M" in the word "Diamond." The applicants contend that this trade-mark is a distinctive mark within the meaning of s. 9, sub-s. 5, of the Act of 1905, and therefore a registrable trade-mark under the Act. They further contend that there is no valid reason why the trade-mark should not be registered. [His Lordship then stated the facts, and continued:] The main contention of counsel in support of the registrar's decision is that a trade-mark, in order to be registrable as a distinctive mark under sub-s. 5 of s. 9 of the Act of 1905, must contain at least one of the essential particulars designated in sub-ss. 1 to 4 of that section, and that as the applicants' trade-mark does not fulfil that condition it is not a registrable trade-mark; and in support of this argument the decisions in *In re Price's Patent Candle Co.* (1) and *In re Bradley's Trade Mark* (2) are relied upon. Both these cases were decided on the construction of s. 64 of the Patents Act, 1883, the language of which differs materially from that of s. 9 of the Trade Marks Act of 1905. Moreover s. 64 of the Act of 1883 was superseded by s. 10 of the Patents Act, 1888, and the construction of the latter section was considered in the *Solio Case* (3), in which Lord Herschell points out that the introductory words show that the particulars designated under the headings (*a*) to (*e*) are separate and distinct. The present case, however, does not fall to be

(1) 27 Ch. D. 681. (2) 9 R. P. C. 205.
(3) [1898] A. C. 571, 579.

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decided either under s. 64 of the Act of 1883 or under s. 10 of the Act of 1888, but under s. 9 of the Act of 1905. Whatever doubts may have existed under the former Acts, I am of opinion that the introductory words of s. 9 of the Act of 1905 make it quite plain that it is sufficient in order to constitute a registrable trade-mark that the mark should contain one of the essential particulars designated in sub-ss. 1 to 5, which sub-sections are separate and distinct. Further, I am of opinion that the expression "any other distinctive mark" in sub-s. 5 means a distinctive mark other than the mark designated in the preceding sub-ss. 1 to 4. When a trade-mark is claimed as a distinctive mark under sub-s. 5 the only essential particular which s. 9 requires it to contain is that it should be distinctive, and there is nothing in the section to suggest that a mark cannot be distinctive unless it contains one or more of the essential particulars designated in sub-ss. 1 to 4. For these reasons I am of opinion that the decisions in *Price's Patent Candle Co.'s Case* (1) and in *Bradley's Case* (2) have no application to the present case, and that the contention founded on these decisions cannot be sustained. The result of this conclusion is that, in order to ascertain whether the applicants' trade-mark is a registrable trade-mark, the sole question to be determined is whether it is adapted to distinguish the vehicles of the applicants from those of other manufacturers, and that in determining this question it is, in my judgment, immaterial to consider whether any of its component parts are or are not registrable by themselves under sub-ss. 1 to 4.

Now it has often been said that it is wrong, in judging whether a combination mark is distinctive or not, to dissect the mark and to show that each of its component parts is not distinctive in itself and then, as the result of this process, to conclude that the mark as a whole is not distinctive. It has been argued on behalf of the applicants that the registrar in the present case has fallen into the error of adopting this process. Although I think that the language employed by the registrar in stating his reasons may be open to some

(1) 27 Ch. D. 681. (2) 9 R. P. C. 205.

criticism in this respect, yet I do not think that it is doing justice to his decision to hold that he had lost sight of the fact that what he had to consider was the totality of the mark. In my opinion the fair inference to draw from his reasons is that he considered that the mark as a whole was not distinctive, but that in explaining how he arrived at that conclusion he dealt separately with each element of which the mark was composed. It is not very easy to see how he could have explained himself otherwise. In my judgment however the registrar was wrong in holding that the applicants' trade-mark as a whole is not a distinctive mark within s. 9, sub-s. 5, of the Act of 1905 and therefore not a registrable trade-mark. In the first place the applicants' trade-mark unquestionably fulfils the essential requisites of a trade-mark prescribed by s. 3 of the Act of 1905. It consists of a combination of a device (namely, the diamond-shaped double border), of a word (namely, the word "Diamond"), and of a letter (namely, the letter "T"), and it is proposed to be used upon and in connection with goods for the purpose of indicating that they are the goods of the applicants by virtue of manufacture. In the next place I am of opinion that the applicants' trade-mark is adapted to distinguish the applicants' vehicles from those of other manufacturers. As pointed out by Lord Parker in the *W. and G. Case* (1), in order to determine whether a mark is so adapted it must be considered apart from the effects of registration. What has to be ascertained is whether the mark itself, if used as a trade-mark, is likely to become actually distinctive of the goods of the person so using it; this must largely depend upon whether other traders are likely in the ordinary course of business and without any improper motive to desire to use the mark, or one resembling it, upon or in connection with their own goods. Although the test of distinctiveness thus laid down is quite plain, yet it is not always easy to determine whether any particular mark does or does not satisfy that test; that is a question upon which different minds may well take different views.

(1) [1913] A. C. 624, 634.

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In the present case I have come to the conclusion that the applicants' mark does satisfy the test laid down by Lord Parker. I am clearly of opinion that the mark is one which will suggest to the purchaser of the applicants' vehicles that it has been chosen and is being used by the applicants in order to distinguish their vehicles from those of other manufacturers. It is in no sense a mark which would convey to the eye or ear of a purchaser that it is being used in a descriptive or laudatory sense, nor is it one which might reasonably be supposed to apply to motor vehicles generally. No person seeing it affixed to a motor-car or motor lorry could in my opinion reasonably come to the conclusion that it was so affixed for any purpose other than to indicate that the car or lorry was manufactured by the proprietor of the mark and not by some other manufacturer. If I am right in this opinion it goes in my judgment a long way towards proving that the mark is adapted to distinguish the vehicles of the applicants from those of other manufacturers.

But then it is argued that although the trade-mark may prima facie be adapted to distinguish the goods of the applicants from those of other manufacturers yet under the following circumstances it is not in fact so adapted. The circumstances to which I refer are that there are already six marks on the register in class 22 containing a diamond-shaped border; that a diamond-shaped border must therefore be regarded as common to the trade; that the word "Diamond" does not carry the matter any further as it merely describes the border; and that the addition of the letter "T," which is open to the trade, does not make the mark as a whole distinctive to the eye or to the ear. Now admitting that the diamond-shaped border is common to the trade and that the word "Diamond" carries the matter no further, the result is that there is now in existence a class of marks which I will call "Diamond Marks." Further, admitting that certain traders with the initial letter "T" might hereafter use that initial upon or in connection with their goods, the result would be that a class of marks might spring up which I will

call " T marks," and for the purposes of this judgment I will assume that such a class is already in existence. Nevertheless I am of opinion that the existence of " Diamond Marks " and of " T " marks does not prevent the applicants' mark, which for the first time combines the common feature of each class, from being a mark which is likely to be actually distinctive of the applicants' vehicles apart altogether from the effects of registration. Both to the eye and to the ear the applicants' mark is a " Diamond T " mark. There is no other " Diamond T " mark at present in use in the trade and I do not consider that traders are likely hereafter in the ordinary course of business and without any improper motive to desire to use a " Diamond T " mark upon or in connection with motor-cars and motor trucks. In the circumstances therefore I have come to the conclusion that the applicants' trade-mark is one which is adapted to distinguish the vehicles of the applicants from those of other manufacturers. I may add that in coming to this conclusion I have not taken into consideration the fact that the user of the mark in the U.S.A. has rendered the trade-mark in fact distinctive in that country. I prefer not to express a final opinion upon the question whether it is legitimate to take this fact into consideration: prima facie I should have thought that the last paragraph of s. 9 has reference only to a mark having become in fact distinctive in the United Kingdom by user in the United Kingdom. In the result for the reasons stated I hold that the applicants' mark is a distinctive mark within the meaning of s. 9, sub-s. 5, of the Act of 1905, and therefore a registrable trade-mark under the Act.

There remains the question whether the trade-mark ought to be registered. For the reasons expressed by Sargant J. in the *National Cash Register Co.'s Case* (1) I concur with that learned judge's opinion that in determining whether a registrable trade-mark ought to be registered, considerable importance ought to be attached to the fact that the mark has been registered and used as a trade-mark not only in the country of its origin but also in most of our overseas

(1) 34 R. P. C. 273, 282.

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Dominions and in many other countries abroad. In my opinion this reasoning applies to the present case notwithstanding there has hitherto been no user of the applicants' mark in the United Kingdom.

The registrar has however stated three further objections to the registration of the applicants' trade-mark all of which deserve careful consideration. The first of these objections is that if the applicants' mark were registered the public might conceivably be under the impression that the applicants had obtained a monopoly in the use of the diamond-shaped border and embarrassment in the trade would follow. In my opinion the registration of the applicants' mark ought not to, and would not in fact, cause any such impression in the mind of any reasonable trader desirous of using a diamond border as part of his trade-mark or that any embarrassment in the trade would follow such registration. The fact that there are already six marks with diamond-shaped borders on the register in respect of the class of goods concerned seems to me to negative this apprehension on the part of the registrar. The registration of these marks seems to me to indicate that the registration of a further trade-mark with a diamond-shaped border would not deter other manufacturers desirous of using a trade-mark with such a border from doing so in the future. Lest however the use of the word "Diamond" in the applicants' mark should after registration be thought to have conferred any exclusive right to such a border I propose as a condition of registration to require the applicants to disclaim any right both to the exclusive use of a diamond-shaped border and also to the exclusive use of the word "Diamond."

The second of the registrar's objections is that it is a very common practice for traders to mark their goods with their initial or initials inside a diamond-shaped border; that such a mark, if the initial were the letter "T," would be described as a "Diamond T" or "T Diamond" mark, and that the registration of the applicants' trade-mark would prevent all persons who had the initial "T" from using that initial in a diamond-shaped border. In my opinion this objection cannot

be sustained. In the first place there was no evidence before the registrar nor is there any evidence before me of the practice which the registrar states to be "very common." The applicants entirely dispute that there is any justification for this finding of fact, and certainly no trade-mark registered or unregistered containing an initial or initials in a diamond-shaped border (except the mark No. 282,388 with which I will deal presently) has been shown to exist either in the class of goods concerned or in any other class of goods. I agree with the registrar in thinking that no trader whose name begins with the letter "T" ought to be prevented from using that initial upon his goods. The registration of the applicants' trade-mark would not in my opinion prevent such use. I have already stated that in my opinion such a trader is not likely without improper motive to want to use a mark identical with or resembling the applicants' trade-mark and I see no objection to preventing such use. It would be open to any trader who wanted to use his initial "T" on motor-cars or motor trucks to use such initial either by itself or in combination with any device not identical with or resembling the applicants' device, and having regard to the unlimited number of devices open to him I cannot agree with the registrar in thinking that such a result would be either undesirable or inconvenient. In order however to prevent the applicants hereafter claiming that the registration of their trade-mark had conferred upon them the monopoly of the use of the letter "T" I propose as a further condition of registration to require them to disclaim any right to the exclusive use of this letter.

The third and last of the registrar's objections is that the applicants' trade-mark bears such resemblance to three marks already on the register as to be calculated to deceive. [His Lordship then dealt with the three marks, No. 90,092, No. 282,388 and No. 344,980, and, after criticizing and comparing them with the company's mark, came to the conclusion that the user of the company's mark would not cause any confusion or deception in the trade and would not be calculated to deceive the public, and continued :] In the result I allow

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the appeal and direct the application for the registration of the applicants' trade-mark to proceed, but subject to the condition that the applicants shall make the disclaimers which I have mentioned.

Solicitors: *Watkins, Pulleyn & Co.; Solicitor to the Board of Trade.*

H. L. F.

END OF VOL. II. AND OF CHANCERY SERIES FOR 1921.

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—— *Bristol Corporation* v. *Sinnott* [1918] 1 Ch. 62, 71.
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—— *Cork Corporation* v. *Shinkwin* (1825) Sm. & Bat. 395.
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Under the Superintendence and Control of the

INCORPORATED COUNCIL OF LAW REPORTING FOR ENGLAND AND WALES.

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1921.—VOL. II. Ch.

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PUBLISHED BY THE COUNCIL AT ITS OFFICE, 30, MONTAGUE STREET, LONDON, W.C. 1,

AND

PRINTED BY W. SPEAIGHT & SONS, LTD., 98-99, FETTER LANE, LONDON, E.C. 4.

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